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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, ET AL.,
PETITIONERS,

vs.

SOUTHERN RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1962
CERTIORARI GRANTED OCTOBER 15, 1962

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the United States District Court for the Northern District of Alabama, Southern Division		
Docket entries	A	1
Complaint	1	4
Motion for preliminary injunction	14	13
Notice of motion for preliminary injunction	17	14
Affidavit of Robert S. Hamilton, Vice President, Marketing and Research, Southern Railway System	18	15
Affidavit of Robert S. Hamilton, Vice President, Transportation Research, Southern Railway Company	23	18
Affidavit of James L. Tapley, attorney and counsellor at law, associated with the Southern Railway Company	31	23

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 25, 1962

	Original	Print
Record from the United States District Court for the Northern District of Alabama, Southern Division—Continued		
Affidavit of Dewey E. Walley, Vice President and Co-owner of Walley Milling Company, Oxford, Alabama	34	24
Affidavit of Thomas L. Melton, Traffic Manager of the Southern States Cooperative Feed Mill, Guntersville, Alabama	36	26
Affidavit of W. Herman Clark, Traffic Manager, Statesville Flour Mills, Statesville, North Carolina	39	28
Affidavit of Sam H. Flint, General Traffic Manager, Quaker Oats Company, Chicago, Illinois	43	30
Affidavit of Howard G. King, President of Arrow Transportation Company	45	32
Supplemental affidavit of Howard G. King, President of Arrow Transportation Company	49	35
Affidavit of John D. Bagwell, Jr., President, John D. Bagwell Farms and Hatchery, Inc., Empire, Alabama	53	38
Affidavit of T. E. Martin, Mayor of the City of Guntersville, Alabama	55	39
Affidavit of John C. McWilliams, Transportation Consultant, etc.	57	41
Affidavit of O. J. Walls, Owner, O. J. Walls Company, Guntersville, Alabama	60	43
Motion of defendant, Southern Railway Company to dismiss	65	47
Answer of Southern Railway Company to complaint	67	48
Memorandum opinion of Judge C. W. Allgood, denying plaintiff's motion for preliminary injunction for lack of jurisdiction, and denying defendant's motion to dismiss	73	52
Findings of fact and conclusions of law and order	78	55
Motion of plaintiffs for a temporary injunction during pendency of appeal	83	59
Order denying application of plaintiffs for a stay order pending appeal	85	60

	Original	Print
Record from the United States District Court for the Northern District of Alabama, Southern Division—Continued		
Notice of appeal	86	61
Bond for costs on appeal	88	62
Designation of contents of record (omitted in printing)	90	62
Clerk's certificate (omitted in printing)	90a	62
Proceedings in the United States Court of Appeals for the Fifth Circuit	91	63
Motion for an injunction to preserve the status quo pending appeal	91	63
Exhibit "A"—Memorandum opinion of Judge		
Exhibit "A"—Memorandum opinion of Judge C. W. Allgood, denying plaintiff's motion for preliminary injunction for lack of jurisdiction, and denying defendant's motion to dismiss (copy) (omitted in printing)	97	67
Temporary restraining order	101	67
Bond for temporary restraining order	104	70
Memorandum of appellants in support of motion for a preliminary injunction	108	74
Transcript of proceedings on motion for an injunction to preserve the status quo pending appeal	137	91
Stipulation re participation of Judge Jones	138a	93
Appearances	138a	93
Reporter's certificate (omitted in printing)	149	99
Order denying motion for injunction pending appeal	150	100
Opinion and order of Supreme Court of the United States, Mr. Justice Black	151	101
Petition of Southern Railway Company for requirement of bond by appellants	157	105
Affidavit of Robert S. Hamilton	164	110
Answer of appellants to petition for requirement of bond by appellants	167	112
Order to transmit certain original documents to Supreme Court	174	115
Clerk's certificate (omitted in printing)	175	116
Opinion, Rives, J.	176	116

	Original	Print
Judgment	189	126
Supplemental answer of appellants to petition of Southern Railway Company for requirement of bond by appellants	190	127
Affidavit of James F. Bromley as to record	204	134
Excerpts from testimony in I.C.C. Docket No. I. & S. 7656	206	135
Testimony of D. W. Brosnan	206	135
W. M. King	208	136
A. C. Henderson	209	136
R. S. Hamilton	210	137
Affidavit of Benjamin M. Schulein	212	137
Letter from C. J. Youngblood, Western Traffic Manager of the Southern Railway System to Benjamin M. Schulein, dated May 2, 1962	213	138
Affidavit of William M. Berger	214	139
Affidavit of R. L. Sprunger	219	142
Clerk's certificate (omitted in printing)	220	143
Order allowing certiorari	221	143

[fol. A]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, d/b/a O. J. WALLS COMPANY, JOHN D. BAGWELL FARMS & HATCHERY, INC., a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation,

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation.

BASIS OF ACTION: Suit to temporarily restrain and enjoin defendants from applying to rail transportation of certain grain certain railroad tariff schedules which are currently under investigation by the I.C.C. (Docket No. I & S 7656) until the Commission can rule on their lawfulness, etc.

For Plaintiff:

Morris K. Sirote, Sirote, Permutt, Friend & Friedman, John C. Lovett, Lovett & Lovett, Benton, Kentucky for all plaintiffs except City of Guntersville; Joe Starnes, Jr., Guntersville, Ala. for City of Guntersville.

For Defendant:

Cabaniss & Johnston for Southern Rwy. Co.; also for Sou. Rwy. Co., William D. McLean, James L. Tapley and William P. Stallsmith, Jr., 15th & K Streets, N.W., Wash. 13, D.C.; Cabaniss & Johnston for St. Louis-San Francisco Rwy. Co. and SAL Rwy. Co.; James A. Simpson for L. & N. R.R. Co.

DATE 1962	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED
July 30	Ck-Sirote, Permutt, Friend & Friedman	15 00	
July 31	Cr 102411		15 00
Aug 2	Cash-John C. Lovett	5 00	

[fol. B]

DOCKET ENTRIES

DATE 1962	
July 27	Complaint filed—Page 1
Aug. 1	Motion of plaintiffs for preliminary injunction filed—Page 2
Aug. 1	Summons and complaint, with copy of motion for preliminary injunction attached, issued with copy for service on the Louisville & Nashville R.R. Company—del. to Marshal for service (Plaintiff's attorneys advise that all other defendants have accepted service)
Aug. 1	Hearing before the Hon. C. W. Allgood on plaintiffs' motion for preliminary injunction—Affidavit of Howard G. King, supplemental affidavit of Howard G. King, affidavit of O. J. Walls, affidavit of John D. Bagwell, Jr., affidavit of Dr. T. E. Martin, affidavit of John McWilliams on behalf of plaintiffs filed—Brief of T.V.A. as amicus curiae in support of motion for preliminary injunction—Affidavits of Robert S. Hamilton (2), James L. Tapley, Dewey L. Melton, W. Herman Clark and Sam H. Flint on behalf of defendants filed—hearing continued to Aug. 2, 1962 at 2:00 P.M.—Pages 18, 23, 31, 34, 36, 39, 43, 45, 49, 53, 55, 57, 60
Aug. 1	Motion of defendant, Southern Railway Company, to dismiss filed—Page 65
Aug. 1	Answer of defendant, Southern Railway Company filed—Page 67

DATE	
1962	
Aug. 2	Hearing resumed—Memorandum opinion of the Hon. C. W. Allgood denying plaintiff's motion for preliminary injunction for lack of jurisdiction, and denying defendant's motion to dismiss filed and entered—copies del. to attorneys
Aug. 2	Summons and complaint, with motion for preliminary injunction attached, returned, executed on L. & N. R.R. on Aug. 1, 1962 and filed—Page 73
Aug. 3	Findings of Fact, Conclusions of Law, and Judgment denying plaintiff's motion for preliminary injunction, for lack of jurisdiction, and overruling defendant's motion to dismiss filed and entered (Allgood)—copies del. all attorneys of record—Page 78
Aug. 3	Motion of plaintiffs for a temporary injunction during the pendency of this appeal filed—copies served by counsel—Page 83
Aug. 3	Order denying application of plaintiffs for a stay order pending appeal filed and entered (Allgood)—copies del. to attorneys—Page 85
Aug. 3	Notice of appeal by plaintiffs filed—service accepted—Page 86
Aug. 3	Cost Bond on Appeal ($250) filed by plaintiffs—Page 88
Aug. 3	Appellant's designation of contents of record on appeal filed—service accepted
Aug. 3	Record on appeal certified for the U.S. Court of Appeals for the Fifth Circuit, New Orleans, La. —del. to appellants' attorneys for transmittal—Page 90

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, D/B/A O. J. WALLS COMPANY, JOHN D. BAGWELL FARMS & HATCHERY, INC., a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation, Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation, Defendants.

COMPLAINT—Filed July 27, 1962

I

Plaintiffs present this complaint against the defendants to temporarily restrain and enjoin them from applying to the rail transportation of grain certain railroad tariff schedules published by them, which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656, *Grain in Multiple Car Shipments—River Crossings to the South,* until the Commission can rule on their lawfulness.

[fol. 2] Plaintiffs do not seek any relief in this proceeding which would in any way interfere with the pending investigation before the Commission, or which would conflict with any decision of the Commission. They seek solely to maintain the status quo in an area where the Commission is powerless to grant relief, in order to prevent immediate, substantial and irreparable injury and damage to the plaintiffs, as will be hereinafter more fully set out. This is in

accordance with the well established rule that a court of equity will intervene by way of a temporary injunction as an aid in the administrative process in advance of final administrative action.

II

A. Jurisdiction is founded on diversity of citizenship and amount.

(1) Plaintiff, Arrow Transportation Company (hereinafter called Arrow), is an Illinois corporation, having its principal place of business in Sheffield, Alabama.

(2) Plaintiff, O. J. Walls, d/b/a O. J. Walls Company, is a citizen of the State of Alabama.

(3) Plaintiff, John D. Bagwell Farms & Hatchery, Inc., is an Alabama corporation, having its principal place of business in Empire, Alabama.

(4) Plaintiff, City of Guntersville, Alabama, is a municipal corporation, incorporated, created and existing under the laws of the State of Alabama.

[fol. 3] (5) Defendant, Southern Railway Company, is a corporation, incorporated under the laws of the State of Virginia, having its principal place of business in Washington, D. C.

(6) Defendant, Louisville & Nashville Railroad Company, is a corporation incorporated under the laws of the State of Kentucky, having its principal place of business in the State of Kentucky.

(7) Defendant, St. Louis-San Francisco Railroad Company is a corporation incorporated under the laws of the State of Missouri, having its principal place of business in the State of Missouri.

(8) Defendant, Seaboard Airline Railroad Company, is a corporation incorporated under the laws of the State of Virginia, having its principal place of business in the State of Florida.

(9) The matter in controversy exceeds, exclusive of interest and cost, the sum of $10,000.00. This Court has jurisdiction of this action by virtue of Title 28 USC Sec. 1332.

B. Jurisdiction is further founded on the existence of a federal question and amount in controversy.

This action arises under the constitution and laws of the United States as hereafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. This court has original jurisdiction of this action by virtue of Title 28 USC Sec. 1331.

C. Jurisdiction is further founded on the existence of a federal question arising under particular statutes.

[fol. 4] This action arises under the Clayton Anti-Trust Act, Title 15 USC Sec. 12, et seq., as hereinafter more fully appears, and this court has original jurisdiction of this action by virtue of Title 28 USC Sec. 1337.

III

(a) Plaintiff, Arrow, is a common carrier by barge operating under a certificate of convenience and necessity issued by the Interstate Commerce Commission with operating rights on the Tennessee River and its tributaries, and the Ohio and Mississippi Rivers between Louisville, Kentucky, and St. Louis, Missouri. It is actively engaged in transporting grain as a common carrier in competition with the defendants.

(b) Plaintiff, O. J. Walls, owns and operates a grain storage elevator and related facilities at Guntersville, Alabama. Said plaintiff is engaged in the business of buying, receiving, storing, selling and shipping grain in both intrastate and interstate commerce.

(c) Plaintiff, John D. Bagwell Farms and Hatchery, Inc., is engaged in the business of buying and storing grain, manufacturing feed and producing and selling broilers.

(d) Plaintiff, City of Guntersville, Alabama, is located on the Tennessee River in the State of Alabama, and is the site of a number of grain elevators, grain merchandisers, feed mills and related businesses which utilize com-

mon carriers by barge as the principal means of receiving [fol. 5] large interstate shipments of grain. The City of Guntersville is interested in this action for the reason that its grain industry is in great jeopardy in the event the tariff schedules above referred to become effective, endangering the prosperity, welfare and common good of its citizens.

(e) The defendants are common carriers by rail doing business in interstate commerce and transporting, among other commodities, grain in competition with the common carrier plaintiffs.

IV

During the year 1961 the defendants published drastically reduced rates and charges on the transportation of grain in multiple car shipments from certain Ohio and Mississippi River ports to specified destinations in the southeast. Upon complaint by certain competing barge lines and other protestants, the Interstate Commerce Commission found with respect to the proposed rates that "there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . .". The Commission suspended such proposed rates for 7 months, or until March 9, 1962, pursuant to Title 49 USC, Sec. 15(7) of the Interstate Commerce Act.

[fol. 6] Said Section provides that the Commission may suspend proposed rates for not longer than 7 months beyond the time when they would otherwise go into effect and that "if the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rates . . . shall go into effect at the end of such period."

V

The Commission certified that the issue was of great national transportation importance and initiated an exten-

sive investigation into the lawfulness of the proposed rates. An Examiner of the Commission began hearings in the matter on January 6, 1962. To date these hearings are still in progress. Over 13,000 pages of testimony and 640 exhibits have already been received in evidence. Plaintiffs are informed and believe and upon such information and belief aver the fact to be that these hearings will not be completed prior to August 15, 1962, and that the Commission will not be able to render its decision on the merits until at least two months thereafter.

Plaintiffs further allege that they are informed by their counsel, which information they verily believe to be true and upon which information and belief aver as a fact, that upon final hearing the Commission will in all likelihood declare said rates unlawful, but even if so, plaintiffs aver that, unless said rates are suspended pending the hearing [fol. 7] by the Commission it might take as long as two years to exhaust the administrative and judicial process until the order of the Commission invalidating said rates actually become effective. Thus, for all practical purposes, the plaintiffs are in danger of having imposed upon them, for a long period of time, a schedule of destructive and unlawful rates without administrative or judicial or other due process and pending ultimate determination of the lawfulness thereof.

VI

The defendants have voluntarily extended the effective date of the proposed rates from March 9, 1962 to August 7, 1962, but defendants have declined plaintiffs' numerous requests that they voluntarily postpone the effective date beyond August 7, 1962 and until the decision of the Commission, and plaintiffs are informed and believe and upon such information and belief aver it to be the fact that the defendants will place the rates and charges into effect at 12:01 A. M. on August 7, 1962, unless restrained by this Court.

VII

As previously averred, the Interstate Commerce Commission has, under the limitations set out under Section 15(7)

of the Act, exhausted its discretion and authority to further suspend said rail rate schedule, and is powerless to aid its own administrative process in order to prevent the irreparable harm and damage to the plaintiffs, which will be hereafter more fully shown.

[fol. 8]

IX

The plaintiffs aver that the proposed rates and charges are unjust, unreasonable and unlawful and were designed to serve primarily as a destructive competitive practice and device, and to discriminate against Arrow and other connecting common carrier barge lines. Substantially all of said rates are below the out-of-pocket costs of the defendant railroad carriers and all such rates are unreasonably lower than necessary to meet barge competition, and were proposed with the aim and purpose to monopolize the transportation of grain in interstate commerce in favor of the defendants and to the exclusion of Arrow and all other competing common carriers by barge, all in violation of the National Transportation Policy, and Sections 1 and 3(4) of the Interstate Commerce Act.

X

Plaintiffs further allege that the defendants are attempting to monopolize and have combined and conspired with each other in attempting to monopolize the transportation of grain in interstate commerce from the Ohio and Mississippi River ports to the southeast by drastically and unreasonably reducing their rates below their costs so as to destroy competition from the barge lines operating on the Tennessee River. Such attempt to monopolize the transportation of grain is in violation of Section 2 of the Sherman Anti-Trust Act, Title 15 USC Sec. 2.

The Commission has exhausted its statutory power to suspend these unlawfully low rates and has no authority or jurisdiction to prevent the defendants from effectuating [fol. 9] their attempted monopoly. Thus, the relief sought by the plaintiffs in this action is not a matter subject to the regulation, supervision or other jurisdiction of the Commission, within the meaning of the exception set out

in Section 16 of the Clayton Act, 15 USC 26, and this Court is, therefore, authorized by said Section to grant injunctive relief to restrain the threatened violation of Section 2 of the Sherman Anti-Trust Act.

XI

The general public has a vital interest in the continued use of the Tennessee River for the transportation of commodities by barge. This public interest will be gravely injured if the proposed rail rates are permitted to become effective. Grain is a highly competitive commodity and tends to move by the lowest cost mode of transportation. The suspended rates are so much lower than the charges attendant upon barge transportation that it will result in the elimination of such means of transportation, and the Tennessee River will cease to be an important artery of commerce.

If the defendants are not restrained from carrying out their said monopolistic plans, Arrow will be compelled to surrender its certificate of convenience and necessity and the public will be deprived of the service now performed by Arrow in transporting grain and all other commodities. The proposed rates, by their inherent nature, are calculated to greatly prejudice the public interest by restricting the free flow of interstate barge transportation on the Tennessee River.

[fol. 10]

XII

The plaintiffs aver that the proposed rates are in disregard of the principles underlying the report and order of the Commission dated March 24, 1959, in Docket No. 30744, *American Barge Line Company, et al.* v. *Alabama Great Southern Railroad Co., et al.*, 306 I.C.C. 167, and the decision of the Court in the Northern District of Alabama in the case of *Arrow Transportation Co., et al.* v. *United States*, 176 F. Supp. 411. Thus, the defendant carriers will, pending final decision by the Commission in the said proceedings now being conducted by it, nullify and frustrate the relief heretofore obtained by plaintiff Arrow after years of bitterly contested and highly expensive litigation.

XIII

Plaintiffs further allege that the yearly volume of business of Arrow amounts to Two Million Dollars and that 80% of such business consists of freight charges arising out of the transportation of grain by barge in interstate commerce; that the total volume of business of the plaintiff, O. J. Walls, arising out of the operation of the grain storage, elevator and related facilities at Guntersville, Alabama, and in the receiving, storing, selling and shipping of grain in both intrastate and interstate commerce amounts to approximately Ten Million Dollars per year; that the value of the businesses in Guntersville, Alabama, whose prosperity depends upon the transportation of grain by barge line runs into many millions of dollars. Plaintiffs [fol. 11] further allege that if said rates are placed into effect the same will make it impossible for the plaintiffs, Arrow and Walls, to remain in business, and will cause them to lose their customers and revenues, and same will adversely affect the whole economy and prosperity of the citizens of the City of Guntersville. The plaintiffs will suffer immediate, great and irreparable harm, financial loss and damage, unless the injunctive relief prayed for is granted by this Honorable Court. Plaintiffs have no adequate remedy at law.

XIV

Plaintiffs further allege that the administrative decree of the Commission may be rendered ineffective, unless, pending final decision, the defendants are prevented by injunctive process of this Court from placing said tariff schedules into effect on August 7, 1962, and it is necessary to invoke the equity powers of this Court to protect the jurisdiction of the Commission in aid of the administrative process and to prevent irreparable injury.

Wherefore, the plaintiffs demand:

1. That the court enter a temporary injunction to preserve and maintain the status quo, enjoining and restraining the defendants from applying to the rail transportation

of grain the tariff schedules published by them, which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656—*Grain in Multiple Car Shipments—River Crossings to the South*, said injunction to remain in effect until the entry by the Commission of a final order relating thereto.

[fol. 12] 2. That, if hearing and determination of plaintiffs' application for a preliminary injunction are not completed prior to 12:00 Midnight, August 7, 1962, the Court enter a temporary restraining order to maintain the status quo, restraining and enjoining the defendants from applying to the rail transportation of grain the aforesaid tariff schedules, said temporary restraining order to remain in effect until the hearing and determination of plaintiffs' application for a preliminary injunction.

3. That the plaintiffs have such other and further relief as may be equitable and appropriate in the premises.

Arrow Transportation Company, a corporation, O. J. Walls d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., a corporation, Sirote, Permutt, Friend & Friedman, First Federal Building, 2030 1st Avenue N. W., Birmingham 3, Alabama, by: Morris K. Sirote, John C. Lovett, Lovett & Lovett, Benton, Kentucky, Attorneys.

[fol. 13] City of Guntersville, Alabama, a Municipal Corporation, by: Joe Starnes, Jr., Guntersville, Alabama, City Attorney.

Duly sworn to by Howard G. King, jurat omitted in printing.

[fol. 14] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

MOTION FOR PRELIMINARY INJUNCTION—Filed August 1, 1962

Come now plaintiffs Arrow Transportation Company, O. J. Walls, d/b/a O. J. Walls Company, John D. Bagwell Farms and Hatchery, Inc. and City of Guntersville, Alabama, and move the court for a preliminary injunction in the above entitled cause enjoining the defendants Southern Railway Company, Louisville and Nashville Railroad Company, St. Louis-San Francisco Railway Company and Seaboard Airline Railroad Company, their agents, servants, employees and attorneys, from applying to the rail transportation of grain the tariff schedules published by them, which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656—*Grain in Multiple Car Shipments—River Crossings to the South*, until the entry by the Commission of a final order relating thereto.

The grounds in support of this Motion are:

[fol. 15] 1. Defendants published certain rates and charges on the transportation of grain from certain Ohio and Mississippi river ports to specified destinations in the southeast. These rates were suspended by the Interstate Commerce Commission until March 9, 1962, the maximum period within which such suspension may be ordered by the Commission. The defendants have voluntarily extended the effective date of the proposed rates from March 9, 1962, to August 7, 1962, but have declined to further extend the effective date of such rates.

2. The rates are under investigation by the Interstate Commerce Commission, pursuant to an investigation and hearing undertaken by it, and will, in the opinion of plaintiffs' counsel, be ultimately declared unlawful by the Commission.

The hearing before the Commission is still pending and the said rates will go into effect on August 7, 1962, without an adjudication as to their lawfulness. Immediate and irreparable injury, loss and damage will result to the plaintiffs unless the defendants are enjoined from applying the tariff schedules so published by them, all as more fully set out and described in the verified complaint filed in this Court on July 27, 1962.

3. The administrative decree of the Commission may be rendered ineffective, unless, pending final decision, the defendants are prevented by injunctive process of this Court from placing said tariff schedules into effect. Accordingly, [fol. 16] injunctive relief is sought not in opposition to but in aid of the administrative process. The plaintiffs have no adequate remedy at law.

If this preliminary injunction be granted, the injuries, if any, to defendants herein, if final judgment be in their favor, will be inconsiderable and will be adequately indemnified by bond.

Arrow Transportation Company, O. J. Wall's Company, John D. Bagwell Farms & Hatchery, Inc., By: Sirote, Permutt, Friend & Friedman, First Federal Building, 2030 First Avenue North, Birmingham 3, Alabama, By: Morris K. Sirote, John C. Lovett, Lovett & Lovett, Benton, Kentucky, Attorneys for Plaintiffs.

City of Guntersville, Alabama, By: Joe Starnes, Jr., Guntersville, Alabama, City Attorney.

[fol. 17] NOTICE

To: Southern Railway Company, a corporation
Louisville and Nashville Railroad Company, a corporation
St. Louis-San Francisco Railway Company, a corporation
Seaboard Airline Railroad Company, a corporation

Please take notice that the undersigned will bring the attached motion for a preliminary injunction on for hearing

before the Honorable Clarence W. Allgood, Judge of the United States District Court for the Northern District of Alabama or before such other judge who may be sitting in his place and stead, at the United States Court House, Birmingham, Alabama on the 1st day of August, 1962 at the hour of 10:00 A.M., or as soon thereafter as counsel can be heard. A copy of the complaint filed in said court is attached hereto.

Morris K. Sirote, Sirote, Permutt, Friend & Friedman, First Federal Building, 2030 1st Avenue N., Birmingham 3, Alabama, John C. Lovett, Lovett & Lovett, Benton, Kentucky.

[fol. 18]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Jefferson County.

Robert S. Hamilton being first duly sworn does depose and say as follows:

I am Vice President, Marketing and Research, Southern Railway System, with headquarters at Washington, D. C.

1. During the summer of 1961 as Assistant Vice President, Transportation Research, Southern Railway System, I devised a schedule of rates to be applied to the movement of grain in multiple car shipments into and within the Southeast. As the chief architect of these rates I consulted only with officers of Southern Railway System and at no time did I discuss the level of rates or the possibility of publishing rate reductions on grain with any representative

of any other railroad. To the best of my knowledge no other officer of Southern Railway System had any such discussions with any officer of any other railroad. Until approximately one week prior to publication of these reduced grain rates the exact scale forming the basis of the rates was known only to me.

[fol. 19] Southern Railway System announced the publication of reduced grain rates in July, 1961, the rates to become effective the following month. After announcement and publication several other railroads in the Southeast expressed dissatisfaction with Southern's unilateral action in publishing these rates without consulting with them through the usual channels. Other Southeastern railroads subsequently published a similar level of rates, however, in the case of one other railroad the scale varies to some extent from that used by Southern since this other railroad could not determine the exact scale used in the Southern publication.

There was absolutely no concert of action between Southern and any other railroad in connection with the determination and publication of these rates which subsequently were suspended by the Interstate Commerce Commission and are now being investigated in ICC Docket I & S 7656.

2. Southern has voluntarily consented to two extensions to the seven month suspension period which the Interstate Commerce Commission imposed under the law. The first of these extensions to which Southern voluntarily agreed was necessitated by a requested delay from October 10, 1961 until January 8, 1962 for the commencement of the hearings ordered by the Interstate Commerce Commission. The second extension, which was for a one month period, was necessitated by the illness of Southern's counsel which resulted in Southern's requesting a one month adjournment in the hearings.

[fol. 20] The net result is that due to voluntary postponements by Southern the effective date of the rates has been pushed forward from March, 1962 until August 7, 1962. During this period Southern has been deprived of needed revenues and the people of the South have been deprived of substantial rate reductions which, according to the ex-

tensive testimony before the Interstate Commerce Commission are badly needed to assure the preservation of the poultry and livestock industries and to which the people of the South are rightfully entitled. Southern cannot under the circumstances agree in good conscience to a further extension of the effective date of the rates. In my judgment it would be highly disruptive to anticipated business transactions which have been planned in contemplation of the reduced rates becoming effective on August 7, 1962.

3. The rates in question are applied equally regardless of whether the grain is grown at the point of origin or whether it is shipped in by rail, barge or any other mode. They are based on a mileage scale and in every instance are directly related to the short line railroad mileage from origin to destination.

4. There is testimony in the record before the ICC in I & S-7656 to the effect that Southern will publish these rates from any origin to any destination wherever there is [fol. 21] a request for such publication. Although Southern does not serve Guntersville, it is willing to publish these rates from Chattanooga and any other Tennessee river port it serves. The L & N Railroad, in my judgment, can and will publish rates from Guntersville to meet competitive rates from other Tennessee ports. This would be done when Southern published rates from Chattanooga.

5. Southern has offered on the record to publish single car rates when the multiple car rates go into effect. Southern's willingness to publish single car rates on the same bare transportation basis has been stated publicly many times and has also been stated on the record in the ICC proceeding. The single car rates will exceed the multiple car rates only by the amount necessary to cover the increased cost to Southern of handling such shipments.

6. There have been allegations that the large aluminum covered hopper cars involved in Southern's multiple car grain rates are no technological breakthrough. Twenty years ago, or even ten years ago, metallurgical science had not advanced to the point which would have made these high capacity cars possible. In fact, it was necessary for

Southern to utilize the services of several outstanding engineering consulting firms as well as the engineering [fol. 22] staff of Lockheed Aircraft in developing a satisfactory design.

Robert S. Hamilton

Subscribed and sworn to before me this 1st day of August, 1962. Roberta Murray, Notary Public. My Commission expires March 21, 1966.

[File endorsement omitted]

[fol. 23] IN UNITED STATES DISTRICT COURT

AFFIDAVIT—Filed August 1, 1962

District of Columbia, ss.

Robert S. Hamilton, Vice President, Transportation Research, Southern Railway Company, being duly sworn deposes and says:

The South is a deficit area for grain; large quantities of grain must therefore be brought into the South from the surplus producing areas of the Middle West.

Grain consumption in the South has increased tremendously in recent years. The rail carriers have not shared in this increase. The traffic is being handled into Southern Territory predominantly by itinerant unregulated trucks and to a lesser extent by water carriers, much of it in private and exempt water carriage. Truckers haul northbound such commodities as citrus, potatoes, lumber, furniture and pipe and bring back grain from the Middle West as a "backhaul." These trucks are free to handle grain on a buy-sell basis (and many do) or to charge whatever they can get for bringing back a particular load of grain.

At my direction, McKinsey & Company, a consulting firm of international repute, undertook for us an analysis to determine what modes of transportation are used to bring grain into the South.

[fol. 24] McKinsey's analysis revealed that from 1955 to 1959, the grain deficit in the Southeast rose from 3.6 million

tons to 10.8 million, and that the various transportation modes divided the traffic as follows:

	1955	*1959*
Rail	56%	20%
Barge	25%	20%
Truck	19%	60%

While the truck share rose from 19 percent of the total to 60 percent in the five-year period, the water share of the market shrank and the rail share plummeted to a fraction of what it had been.

It was to meet this problem that these rates were published. The truck grain is exempt from regulation by the Interstate Commerce Commission as an exempt agricultural product and the barge grain is exempt under Section 303(b) of the Interstate Commerce Act, 49 USC Section 903. Under this bulk exemption provision, the water carriers are free to charge any rate they see fit.

Southern, after several years of research and planning, has developed and now owns several hundred lightweight aluminum hopper cars of high capacity which have been developed to handle bulk commodities such as grain. These cars have a capacity of 100 tons of corn or wheat, whereas the conventional box car now in general use for handling grain normally carries about 50 tons or slightly more. [fol. 25] Using this high capacity hopper car equipment in multiples of five, ten or twenty cars and offering only bare transportation service without frills (no transit, no switching absorption, only 24 hours free time for loading and unloading) Southern proposes to handle volume grain shipments from the Ohio and Mississippi River gateways (Memphis, St. Louis, Evansville, Louisville and Cincinnati) at rates that will be highly profitable to it and which will effectively compete with unregulated trucks and barges. The proposed volume rail rates require a minimum shipment of 450 tons. These rates will return a large amount of traffic to the railroads, but they will not eliminate barge transportation on the Tennessee or any other river.

Much of the grain moving into Southern Territory by truck is moving from areas that barges are not serving

or areas from which no barge grain has ever moved into the South. From those areas the *only* competition faced by the railroads is the unregulated trucker. Also, from areas such as Evansville, and St. Louis, from which some barge grain does move into the South, the trucker is a definite competitive factor also. For example, truck grain is moving deep into the South from the very shadow of the barge-loading facilities at St. Louis. Therefore, even from areas that are originating barge grain, the truck is also an active competitive factor in the movement of grain. [fol. 26] No barge grain moves into the Tennessee River from ports on the Ohio River which are east of the Evansville, Indiana area; no barge grain moves from either Cincinnati or Louisville to the Tennessee River ports.

Some barge grain does move from the Evansville area and from St. Louis, but the preponderance of the barge movement to the Tennessee River is from the Illinois Waterway and the upper Mississippi River north of St. Louis. The principal barge origins are therefore in areas Southern Railway does not serve and from which no reduced multiple-car rail rates are proposed either by Southern or by any other rail carrier.

The published rates on grain of the water lines, which may be adhered to or not as they see fit, are $2.39 per ton from St. Louis to Guntersville and $2.11 from Evansville to Guntersville. These may be compared with the rail rates that have been proposed of $3.21 per ton from St. Louis and $2.58 from Evansville. Today's published barge rates are lower therefore by 62 cents from St. Louis and 47 cents from Evansville than the proposed new multiple-car rail rates.

Grain today is moving by barge to Guntersville and other Tennessee River ports both for storage and for processing. About 45 percent of the grain moving to the Tennessee River ports is actually processed at such ports. The rail- [fol. 27] roads will not be in position to divert from the barge lines that grain traffic which is moving to the Tennessee River ports for processing and the merchandisers located at the Tennessee River ports will, in my judgment, continue to operate and continue to use barge transpor-

tation to a substantial extent. One such merchant, who also operates a large feed mill at Guntersville, has testified before the Interstate Commerce Commission in I&S 7656 that his company is presently serving their Guntersville facility by barge and will continue to do so after the volume rail rates become effective.

The present rail rates are based on a single car minimum weight, whereas the proposed rates require a minimum shipment of five cars with a minimum weight of 450 tons per shipment. The present single car rail rates are subject to transit, *i.e.*, the grain may be stopped for storage or for processing and the shipper is only required to pay the through rate from origin to destination rather than a combination of local rates. The furnishing of transit services is very expensive for the railroads because transit not only involves extensive clerical work, but it also encourages shippers to make use of the most circuitous rail routes, which inevitably increases the cost to the railroads of providing such service. In designing the multiple-car rates, which will cover only bare transportation service [fol. 28] without transit, it was my purpose after studying the cost-revenue relationship on the present single-car rates to establish multiple-car volume rates that would return approximately the same profit per hundred pounds. Actually the proposed multiple-car rates will provide a slightly greater profit per 100 pounds or per ton than the present single-car rates; this, because no "extras" are offered under the proposed rates, and the economies of volume transportation and maximum equipment use substantially reduce rail costs of providing the service. The volume of grain traffic transported by Southern under the multiple-car rates will be very materially increased.

Based on actual studies of the movement of these high capacity aluminum hopper cars, the proposed rates will be highly profitable. In contending the proposed rates are at or near out-of-pocket costs, the protestants have ignored many operating facts that must be considered in pricing out the operation being proposed. Neither the equipment utilization nor the length of haul under the proposed rates is "average"; therefore, average costs are not meaningful

with respect to this traffic. Based on Southern's cost studies which were made under my supervision and direction, the proposed rates will provide revenues that are more than 140 percent of the costs.

[fol. 29] The rates proposed will apply to all connecting lines alike. If grain comes to St. Louis or to Evansville by water and moves beyond by rail on the multi-car rates, that grain will pay no more and no less than rail grain which has moved to those storage points or than truck grain which has moved to those storage points. All grain will be treated exactly alike under the proposal no matter what mode of transportation has handled it prior to movement on the multi-car rates.

The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners have been highly in favor of the rates and have given active support. The United States Department of Agriculture has also actively supported the proposed volume rail rates throughout the proceeding before the Interstate Commerce Commission. Receivers and processors all over the South, too numerous to name, have also supported the rates.

Southern initiated these volume grain rates and Southern alone. No other railroad was consulted prior to Southern's announcement of the proposed rates, and after Southern's rates were announced, the other railroads, some reluctantly, published the same rates for competitive purposes.

Robert S. Hamilton

[fol. 30] Subscribed and sworn to before me this 28th day of July, 1962.

P. K. Howard, Notary Public of District of Columbia.
My Commission expires May 1, 1965.

[File endorsement omitted]

[fol. 31]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT—Filed August 1, 1962

District of Columbia, ss.

James L. Tapley, being duly sworn, deposes and says he is an attorney and counsellor at law associated with the defendant, Southern Railway Company, and that he has knowledge of all the facts hereinafter set forth:

Hearings in I. & S. 7656, now pending before the Interstate Commerce Commission, began January 8, 1962. Respondents' direct case, at which time respondents and parties supporting respondents presented their witnesses, consumed 24 hearing days from January 8 to February 8. During this time 52 witnesses testified and the record amounted to 3,037 pages of transcript.

Protestants' case was heard between February 13 and June 11. Eighty-six witnesses presented evidence. This took 58½ days and 7,375 pages of transcript.

Respondents' rebuttal case started June 11. Through July 27, the rebuttal portion of the proceeding has taken 33½ days. Thus, a total of 116 hearing days have been used as of July 27; the record already amounts to 13,760 pages and 660 exhibits; and 152 different witnesses have testified.

[fol. 32] In order to expedite the hearing and to minimize the time for presentation of direct evidence, respondents prepared rebuttal evidence in prepared statement form for most of the witnesses and this material was distributed to opposing counsel and the presiding examiner well in advance of the appearances of the witnesses on the stand. Because the rebuttal statements have been prepared in this manner, little time has been consumed for the purpose of presenting direct testimony; the prepared statements have been received for the record as exhibits and the hearing time since June 11 has been devoted largely to cross-examination of the rebuttal witnesses by protestants' counsel.

Protestants' cross-examination of rebuttal witnesses has been extremely lengthy. For example: Witness Haldeman, who presented a rebuttal statement of 69 pages, was cross-examined on 9 days, June 26 through July 11, a total of 731 pages of the record being consumed for cross-examination of this witness alone. Witness Hodges, who presented a rebuttal statement of 23 pages, was cross-examined 7 days for a total of 505 pages of the record given over to his cross-examination alone. Witness Saunders, who is still on the stand, presented a rebuttal statement of 101 pages and as of July 29, this witness had been on cross-examination for 4 days and 349 pages of the transcript and only about ⅓ of the witness' statement had been covered in [fol. 33] that time by the cross-examiner, the other ⅔ still remains to be treated with.

James L. Tapley

Subscribed and sworn to before me this 28th day of July, 1962.

P. K. Howard, Notary Public of District of Columbia.
My Commission expires May 1, 1965.

(Seal)

[File endorsement omitted]

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Jefferson County, ss.

Dewey E. Walley of Oxford, Alabama, being duly sworn deposes and says:

I am vice-president and co-owner of Walley Milling Company in Oxford, Alabama, where I engage in a feed manufacturing and poultry producing operation. We use 17,000 bushels of grain weekly. A very small percentage of which is locally produced. On an annual basis only about 10% of our grain comes from grain merchants at Guntersville whereas almost 90% of our annual grain receipts come by means of itinerant and unregulated trucks from the Middle West, Illinois and Indiana and Ohio and even occasionally from Michigan and Iowa. Although our mill is only 60 miles from Guntersville we are in no sense dependent on grain receipts from the Tennessee River, Guntersville, or any other Tennessee River port. In my area grain rates by [fol. 35] itinerant trucks from the Middle West have increased tremendously in recent years and are now the decisive transportation means of bringing grain in.

When the proposed volume rail rates which we vigorously supported before the Interstate Commerce Commission become effective we are in a position to use them and will use them. My firm and the poultry, hog and egg producers associated with it would be denied an income that would be a minimum of $50,000 per year and in all probability would exceed $75,000 if these proposed rail rates are not permitted to be put in effect.

Dewey E. Walley

Subscribed and sworn to before me this 1 day of August, 1962. Paul S. Swanson, Notary Public. My Commission expires 12-2-62.

[File endorsement omitted]

[fol. 36]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Jefferson County.

Before me, the undersigned authority in and for said County and State, personally appeared Thomas L. Melton, who being by me first duly sworn on oath deposes and says as follows:

My name is Thomas L. Melton, and I am a resident of Guntersville, Alabama. I am employed by Southern States Cooperative in the capacity of Traffic Manager of the Southern States Cooperative feed mill located in Guntersville and have held this position for the past five years. The principal business of this mill is the manufacture of finished feeds, and it is one of the three largest feed mills in Guntersville doing a business of approximately 125,000 tons a year. In my capacity as Traffic Manager I am directly responsible for the movement of all grain purchased for the use of this mill from the point of purchase to Guntersville. I am thoroughly familiar with the comparative costs [fol. 37] of the shipment of grain from our points of purchase to Guntersville by barge, rail and truck, including the multiple car grain rates at issue in this case. On the basis of a determination that shipment of grain to Guntersville by barge is substantially less expensive than shipment by other means of transportation, Southern States Cooperative has used barge transportation exclusively for the past five years except for the brief period during which such transportation was rendered impossible by the break in Wheeler Dam. Under the present barge rate tariffs the shipment of grain to Guntersville by barge will continue to

be the most economical means of moving our grain after the effective date of the new multiple car rail grain rates. Southern States Cooperative will continue to transport its grain to Guntersville by barge after those rates become effective, and we do not anticipate any adverse business effects from the introduction of the new rail grain rates. The Guntersville mill is an established facility of Southern States Cooperative and it is the intention of Southern States to continue its Guntersville operation indefinitely. While the reduced multiple car rail grain rates will not be useful to us in moving grain to the Guntersville mill, they do not in any way affect our evaluation of the economic future of Guntersville or our intention to continue the operation of our mill at Guntersville.

[fol. 38] Allied Mills, which also operates a large facility at Guntersville (feed mill about the size of ours and a soybean processing plant as well) is in the process of constructing a Marine facility which will handle 10,000 bushels of grain per hour from barges. This is a modernization of their present Marine facility which will enable much faster unloading of barge received soybeans and corn. They are making this large expenditure with the full knowledge that the proposed volume rail rates are about to become effective.

Thomas L. Melton

Subscribed and sworn to before me this 1 day of August, 1962. Paul S. Swanson, Notary Public. My Commission expires 12-2-62.

[File endorsement omitted]

[fol. 39]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Jefferson County.

Before me, the undersigned authority in and for said County and State, personally appeared W. Herman Clark, who being by me first duly sworn on oath deposes and says as follows:

My name is W. Herman Clark and I reside at 325 Magnolia Avenue, Statesville, North Carolina. I am Traffic Manager for Statesville Flour Mills and have held that position for five years. For six years before I became Traffic Manager I was Assistant Traffic Manager of the same company. Statesville Flour Mills is in the business of milling flour and milling and mixing grain feed. Its daily output of flour is approximately 240,000 pounds and its weekly output of mixed feed is approximately 600 tons. Statesville Flour Mills employs about 150 employees in its plant at Statesville and has eight warehouses within a radius of 200 miles of Statesville, each of which employs from 3 to 5 employees.

[fol. 40] Statesville Flour Mills anticipates receiving approximately 800,000 bushels of wheat from Kansas, 700,000 bushels of wheat from Cincinnati and 365,000 bushels of corn from Cincinnati within the next twelve months. Of that amount 600,000 bushels of wheat from Kansas, 100,000 bushels of wheat from Cincinnati and 15,000 bushels of corn from Cincinnati have already been booked. We have already bought all of the local wheat available which has practically been stopped at this time due to many factors, including particularly the Soil Bank program and farmers leaving the farms.

On the wheat and corn, as stated above, that we will receive from Kansas and Cincinnati, I have calculated the freight charges that will have to be paid under the present system of rates and also the freight we will have to pay on such shipments according to the published rates of Southern Railway Company and other railway companies which we hope will become effective August 7, 1962. The published rates will cost us $246,780 less than the present rates.

Of course, I am better acquainted with the operations of Statesville than any other company in the business of milling or processing grains, but I know that throughout many states in the South and the Southeast there are several hundred companies engaged in such business and that generally, except for differences in the length of haul, the proposed freight rates would effect, percentage wise, cor- [fol. 41] responding savings in costs of freight shipments of grain to them from Kansas and Cincinnati. Generally they would have the same sources of supply, that is Cincinnati and Kansas, as we do.

My knowledge of the affairs of millers, farmers, and those engaged in raising poultry and live stock convinces me that their most critical need today is reduced rates on whole grains from the west to the south and that the proposed rates will be of great benefit to them and to the public as a whole that may be affected by their welfare. It is the intention of our company, and I am sure it is the intention of other companies, to pass on to the public a just share of our anticipated savings.

Although we have been dependent to a great extent upon barges from Kansas City to Chattanooga for shipments of hard wheat on account of the lower costs to us by such method of shipment, the barge facilities have not been adequate for our needs during the last several months. The explanation that has been given us was that the barges were being used on the Mississippi south of St. Louis to New Orleans for foreign shipment. I have carefully calculated the amount of extra expense to Statesville Flour Mills that has been caused by inadequacy of facilities for shipment by barge, which in turn has required us at times to ship all

the way by rail. The amount of such loss to us to date during the past several months has been $61,050.

[fol. 42] In anticipation of the proposed multiple car freight rates going into effect on August 7, Statesville Flour Mills has purchased equipment and made changes of a material nature to accommodate hopper cars which are to be used in the shipment of grain. I am unable to state the amount of expense that has been incurred in this respect, but it has been considerable. It is my understanding that other mills throughout the affected regions have made similar arrangements and have incurred substantial expense in doing so.

W. Herman Clark

Subscribed and sworn to before me this 1 day of August, 1962. Paul S. Swanson, Notary Public. My Commission expires 12-2-62.

[File endorsement omitted]

[fol. 43]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT OF SAM H. FLINT—Filed August 1, 1962

State of Alabama,
Jefferson County.

Sam H. Flint, being duly sworn, deposes and says:

I am General Traffic Manager of the Quaker Oats Company, Chicago, Illinois, with which I have been associated since 1953. From 1946 to 1952 I was with the Georgia Public Service Commission as Director of its transportation division. During that time, by reason of my association

with Walter R. McDonald, who was then and still is a member of the Georgia Commission, President of the Southeastern Association of Railroad and Utilities Commissioners and Chairman of the Freight Rate Committee of the Southern Governors Conference, I became active in the work of both the Southeastern Association and the Southern Governors Conference.

The Southern Governors Conference has been for twenty-five years actively endeavoring to obtain reasonable freight rates from, to and within the South. Both the Conference and the Southeastern Association have participated in many negotiations and in a number of proceedings before the Interstate Commerce Commission and the courts seeking freight rate relief. Neither of these organizations is allied with or interested in any specific segment of the economy of the South nor in any particular mode of trans- [fol. 44] portation; rather, these organizations represent and speak for all segments of the South's economy, producers, processors and consumers.

The Southern Governors and the Southeastern Association of Railroad and Utilities Commissioners have been trying for many years to secure relief from the inordinately high level of rates on grain. The Southeastern Association is the title plaintiff in a major complaint case seeking lower rates on grain which is now before the Interstate Commerce Commission in Docket 31874. Both the Southern Governors and the Southeastern Association have supported and approved the volume grain rates proposed by the railroads in I & S Docket 7656 in which I testified as spokesman for these groups. We urged the Commission not to suspend these rates and after the suspension we sought vacation of that suspension order.

The public, all segments of it, will benefit as a result of these low volume grain rates. These benefits have been withheld for almost one year. The Southern Governors Conference and the Southeastern Association are of the view that these rates should not be withheld from the public any longer. Every day that the effectiveness of these rates is delayed results in irreparable damage to thousands of

Southern producers and processors and millions of Southern consumers.

Sam H. Flint

Subscribed and sworn to before me this 1 day of August, 1962. Paul S. Swanson, Notary Public. My Commission expires: 12-2-62.

[File endorsement omitted]

[fol. 45]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

Howard G. King, being first duly sworn, deposes and says:

1. That he is President of Arrow Transportation Company, a plaintiff in the above-entitled proceeding; that he is familiar with the traffic handled by that carrier and with its relative importance to the revenue and welfare of that carrier.

2. That Arrow Transportation Company is a common carrier by water, operating under and pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission; that such operations are principally on the Tennessee River; that the major portion of the traffic of Arrow Transportation Company consists of various types of grains moving to the Tennessee River Ports, more than 80% of which is thereafter transported by land carrier from those Tennessee River ports to various processing and consuming points in the Southeast;

[fol. 46] 3. That during the calendar year 1960, the movement of such grains provided over 68% of the total tonnage of Arrow Transportation Company, and produced for it more than two million dollars in revenue, which was more than 80% of its total revenues; and that there was a material change during 1961 because of the collapse of the lock wall at Wheeler Dam but that thus far in 1962 the volume of such traffic and the revenues provided thereby approximated those of 1960;

4. That if the railroad rates on such grains, published and filed with the Interstate Commerce Commission in the tariff publications described in the Complaint in this proceeding which are scheduled to become effective at midnight on August 6, 1962 are permitted to become effective and the railroads are permitted to charge the reduced rates published in the said tariffs, all as more fully described in the Complaint in this proceeding, Arrow Transportation Company will suffer immediate, great, and irreparable injury;

5. That the said tariffs would permit the charging of rail rates on grain moving to points in the Southeast at levels below the charges attendant upon water movement and the rates charged by the railroads for transportation of grain from the Tennessee River ports to interior points in the Southeast, and it has been the experience of Arrow Transportation Company, since it commenced operations many years ago, that it never has been able to participate in any traffic whatsoever when the charges attendant upon the barge movement were on a parity with or were above competitive rail rates;

[fol. 47] 6. That the result of application of the rail rates published in the said tariffs would be to divert from Arrow Transportation Company practically all of the grain traffic which it presently is handling and for many years has handled; that such diversion would result in loss of revenues to Arrow Transportation Company to the extent of approximately two million dollars per year; that the loss of such revenues would cause Arrow Transportation Company serious and irreparable injury, would result in the immediate impairment and the ultimate destruction of its

ability to continue to provide common carrier service under and pursuant to its certificate of public convenience and necessity, and would make it impossible for this Company economically and efficiently to serve the shipping public in the transportation of other traffic which it now handles, resulting in a complete loss of all other traffic;

7. That there would be no adequate remedy for these injuries which are certain to follow if the rail carriers are permitted under the authority of the said tariffs to make effective the reduced rates published therein.

8. That these proposed rates will cause immediate loss of revenue to Arrow Transportation Company, and if the rates are maintained over a period sufficiently long to enable more grain buyers to accommodate themselves to receive, unload and store multiple car shipments, the rates will cause this Company's operations to become unprofitable, will inevitably result in the liquidation of its assets and insolvency, will cause Arrow Transportation Company to cease operating on the Tennessee River and will force [fol. 48] its surrender of its certificate of convenience and necessity.

Howard G. King

State of Alabama,
County of Colbert, ss.

Subscribed and sworn to before me, a Notary Public, in and for the county and state aforesaid, this 1st day of August, 1961. Katherine Shirley, Notary Public. My commission expires: Feb. 12, 1966.

[File endorsement omitted]

[fol. 49]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

SUPPLEMENTAL AFFIDAVIT—Filed August 1, 1962

Howard G. King, being first duly sworn, deposes and says:

1. This affidavit is filed to supplement my previous affidavit filed herein dated August 1, 1962.

2. I am familiar with the tariff schedules filed by the defendant railroads, the lawfulness of which is presently under investigation by the Interstate Commerce Commission. These tariff schedules are said to be based upon a formula. That formula is based upon a figure of 42¢ per ton to cover origin and destination terminal services and 5.73 mills per ton mile to cover the line haul service, subject to a minimum rate of $2.40 per ton. Under the formula the minimum rate is absolute to a distance of 346 miles. The rates apply only on a minimum of five car shipments subject to an aggregate minimum rate of 450 tons per shipment and to a minimum weight per car of 90 tons or full visible capacity, whichever is greater. The proposed rates on 10 car shipments with a minimum of 900 tons per ship-
[fol. 50] ment and on 20 car shipments with a minimum of 1,800 tons per shipment are made in flat amounts of 10¢ and 20¢ per ton, respectively, lower than the rates proposed on the five car shipments.

3. The origin from which specific rates are published embrace only St. Louis, Missouri, Cairo, Illinois, Memphis, Tennessee and the Ohio River crossings of Evansville, Indiana, Louisville, Kentucky and Cincinnati, Ohio. The rates specifically published from such origins apply from intermediate origins on certain direct tariff routes to a

particular destination. The rates do not apply, for example, from the port of Guntersville, Alabama on the Tennessee River because such port is not an intermediate origin within the meaning of the tariff.

4. The following table will illustrate the drastic reductions in rates which have been proposed from the ports of St. Louis and Evansville to four representative destinations in the southeast and the high present rate from Guntersville to the same destinations which will continue in effect.

COMPARISON OF ILLUSTRATIVE RATES
PRESENT AND PROPOSED

	From St. Louis			From Guntersville		
To	Miles	Present	Proposed	Miles	Present	Proposed
Atlanta, Ga.	601	$10.10	$3.86	139	$3.10	None
Birmingham, Ala.	472	8.70	3.12	71	2.20	None
Gainesville, Ga.	654	10.50	4.17	192	3.30	None
Orangeburg, S. C.	847	12.50	5.27	385	6.00	None

[fol. 51]

	From Evansville			From Guntersville		
To	Miles	Present	Proposed	Miles	Present	Proposed
Atlanta, Ga.	441	$ 8.30	$3.98	139	$3.10	None
Birmingham, Ala.	361	7.10	2.67	71	2.20	None
Gainesville, Ga.	494	8.90	3.28	192	3.30	None
Orangeburg, S. C.	687	10.90	4.36	385	6.00	None

Barge Rate: St. Louis, Mo. to Guntersville —$2.39
Evansville, Ind. to Guntersville— 2.11
Transfer charge at Guntersville— .89

5. At the present time the lowest cost transportation available to shippers in St. Louis on a shipment to Birmingham, Alabama is $5.07 per ton. This movement would be via barge from St. Louis to Guntersville, thence via truck to Birmingham. The barge rate is $2.39 per ton. The transfer charge is 89¢ per ton and the truck charge is $1.79 per ton. The barge-rail combination from St. Louis via Guntersville to Birmingham is $5.48 per ton. The all-rail rate from St. Louis to Birmingham is being reduced by the

railroads from $8.70 per ton to $3.12 per ton. If these rates go into effect, grain buyers at Birmingham would no longer buy grain which had moved by barge. To do so they would be required to pay a $1.95 premium. At the present time Arrow transports large quantities of grain to Guntersville which is later trans-shipped to Birmingham. If the rates go into effect, all of this traffic, of course, would be lost to Arrow. A similar situation will exist at such destinations as Spartanburg, S.C. where the premium which the purchaser would be required to pay in order to buy barge grain would be $4.48 per ton and the premium that purchasers at Augusta, Georgia would be required to pay would be $2.74. At the present time Arrow is transporting substantial quantities of grain from St. Louis to Gun-
[fol. 52] tersville which is later trans-shipped from Guntersville, to Spartanburg, and Augusta. All of this business will be lost if the proposed rates go into effect.

6. The foregoing are merely a few illustrative examples of the intolerable rate situation which will prevail if these proposed rates are not enjoined.

Guntersville, Alabama is not a major grain consuming point. Substantially all of the grain transported to Guntersville via barge is subsequently trans-shipped to interior consuming points by rail or truck. If the proposed rates go into effect, the only barge grain which will be received at Guntersville will be that which can be consumed locally in the immediate vicinity of the port.

Howard G. King

State of Alabama,
Jefferson County.

Subscribed and sworn to before me, a Notary Public, in and for the county and state aforesaid, this 1st day of August, 1962. Marion Dockery, Notary Public. My Commission expires: May 3, 1965.

[File endorsement omitted]

[fol. 53]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
County of Jefferson.

John D. Bagwell, Jr., being first duly sworn deposes and says:

I am President and principal stockholder of John D. Bagwell Farms and Hatchery, Inc., Route 1, Empire, Alabama. This Company is an integrated broiler producing concern. This means that we purchase grain and grind and mix it into prepared feed. We feed this prepared mix to broilers which we then sell to broiler processing plants. Our major competitors in producing broilers are large national concerns such as Ralston-Purina, Pillsbury and Quaker Oats who have similar integrated broiler operations scattered throughout the Northern part of Alabama.

Our Company is not located on a railroad, consequently we receive practically all of our corn from Guntersville, Alabama. We purchase approximately 25,000 bushels of barge corn per week and transport it 65 miles from Guntersville to our plant in our own fleet of trucks. I estimate it would cost approximately $150,000.00 for our company to equip itself to make use of the multi-car rates which are now under investigation by the Interstate Commerce Commission. Our entire business has been built upon the availability of low cost barge grain at Guntersville.

The national concerns who are my competitors are presently equipped to receive, unload and store multiple car shipments of grain. If the proposed rates go into effect on August 7 those concerns will be in a position to use [fol. 54] the rates immediately and, with the lower rates,

will be able to produce broilers and substantially undersell our company.

Broiler production is a highly competitive business. The cost of grain represents 33⅓% of the total cost of producing broilers. It is not unusual for 1 cent or 2 cents per bushel difference in the cost of grain to represent the difference between profit and loss in the production of broilers.

If the multi-car rates go into effect on August 7, I will be faced with the alternative of either investing approximately $150,000.00 in rail facilities in order to use the multi-car rates or suffer a serious and immediate competitive disadvantage. If I make the investment and the ICC should then declare the multi-car rates unlawful my investment in the facilities will be sacrificed. In either event, I will suffer serious and irreparable damage and injury if the rates go into effect on August 7.

John D. Bagwell, Jr.

Subscribed and sworn to before me by John D. Bagwell, Jr., on this the 24th day of July, 1962. Donald Graham, Notary Public. My commission expires: 1/12/66.

[File endorsement omitted]

[fol. 55]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

State of Alabama,
Marshall County.

Before me, the undersigned authority in and for said County, in said State, personally appeared Dr. T. E.

Martin, who being by me first duly sworn, deposes and says:

I am Mayor of the City of Guntersville, Alabama and have occupied that office for eight years. The City of Guntersville participated actively in the proceedings before the Interstate Commerce Commission in Docket 30744, *American Barge Line Company, et al.* v. *Alabama Great Southern Railroad Company, et al.*, and was a party to the proceedings in the statutory three-Judge Court in the Northern District of Alabama, which reviewed the Commission's decisions in those proceedings. On July 17, 1962 the Interstate Commerce Commission served its latest order in those proceedings, which order by its terms gives effect to the decisions of the statutory three-Judge Court and in effect directs the railroads to publish non-discriminatory ex-barge rail rates from Guntersville and other Tennessee River ports to the Southeast.

In addition the City has participated actively before the Commission in the hearings investigating the lawfulness of the proposed multi-car rail rates on grain, which are currently under suspension but which unless restrained by this Court will become effective on August 7, 1962 without any prior decision on the merits by the Commission. This will nullify the relief finally granted by the Interstate Commerce Commission in its recent Docket 30744 order after nearly twelve years of litigation.

[fol. 56] The City has participated in these proceedings because the economic welfare of the City is to a large degree dependent upon the grain industry located at our City which relies upon inbound barge movements of grain. At the present time this industry employs approximately seven hundred people, has a gross pay roll of some one and one-half million dollars, and represents an investment of many millions of dollars.

The City is opposed to any manipulation of rail rates which will discriminate against Guntersville and in favor of River ports on the Ohio and Mississippi Rivers. The proposed multi-car rates will seriously handicap, if not actually eliminate, the barge transportation of grain to

Guntersville, and unless these rates are enjoined they will have a devastating effect on the economy of this City.

T. E. Martin

Sworn to and subscribed before me on this 24 day of July, 1962. Polly D. Taber, Notary Public. My commission expires 7-8-64.

[File endorsement omitted]

[fol. 57]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August, 1962

John C. McWilliams, being first duly sworn, deposes and says:

1. That he is engaged in private practice as a transportation consultant, statistician, and cost analyst; that his experience in such matters covers a period of 26 years including employment from March, 1936, to August, 1942, in the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission, and, upon the creation of a Cost Finding Section within the Commission, assignment to that new section; that his duties in the Cost Finding Section included participation in the drafting of formulas for analysis of the costs of various forms of transportation, the application of such formulas, and the analysis of costs and other statistical studies introduced in cases before the Commission.

That for three years, from August, 1942, to August, 1945, he was employed by the American Trucking Associations as Director of Research and Chief Economist; that

his duties in these capacities were a continuing analysis of motor carrier and railroad costs; that since August, 1945, he has been engaged in private practice with the principal emphasis of his work having been analysis of transportation costs; and that he has testified on these matters in numerous cases before the Interstate Commerce Commission and before regulatory commissions of some 20 states.

[fol. 58] 2. That he has made a detailed study of the costs that would be incurred by the respondent railroads in transporting grain under the rates involved in Interstate Commerce Commission I. & S. Docket 7656; that this detailed study was made following the principles set forth in the cost formula designated by the Commission as Rail Form A; that this formula is the standard formula used by the Cost Finding Section of the Commission in all of its publications involving costs and is the only formula which has wide acceptance among private cost consultants for use in estimating rail costs; that such formula provides for modifications of certain of the cost details when an adequate basis for such modification is shown to exist; that all such modifications which were properly supported were made by him in his application of the costs to the movement of the grain in question.

3. That the said study of costs with respect to the movement of grain in jumbo covered hopper cars loaded to 100 tons per car moving 500 tons per shipment disclosed:

(a) That for 60 routes of the Southern Railway System involved in the proceeding the revenues would be below out-of-pocket costs and that for all 185 routes of the Southern Railway System the average revenue would be only 2 percent above out-of-pocket costs.

(b) That for 9184 routes of railroads other than the Southern Railway System the revenues would be below out-of-pocket costs and that for all 1333 routes the average revenue would be only 82 percent of the out-of-pocket costs.

(c) That for all of the routes published by all of the railroads involved in I. & S. Docket 7656 the revenue would

be below out-of-pocket costs for 82 percent of such routes [fol. 59] and that for all of the routes the revenue would be only 84 percent of the out-of-pocket costs.

John C. McWilliams

District of Columbia, ss.

Subscribed and sworn to before me, a Notary Public, in and for the District of Columbia, this 26th day of July, 1962. Carroll F. Genovese, Notary Public. My Commission Expires Oct. 15, 1965.

[File endorsement omitted]

[fol. 60]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

AFFIDAVIT—Filed August 1, 1962

O. J. Walls, being first duly sworn, deposes and says:

My name is O. J. Walls. I am the owner and manager of the O. J. Walls Company of Guntersville, Alabama. This company is actively engaged in the business of buying and merchandising grains of various types. At the present time I am equipped to receive grain, both by rail and barge, and own an elevator at the dock site having a capacity of 60,000 bushels. I was the first grain merchant operating on the Tennessee River, having built my first elevator at Guntersville in 1940.

At the present time I buy and merchandise approximately 7 million bushels of barge grain and 1 million bushels of local grain annually. I buy my barge grain at ports on the Missouri, Mississippi, Ohio and Illinois Rivers,

including St. Louis and Evansville. The multi-car rates as proposed by the Southern Railway Company, which are now under investigation by the ICC, will drastically reduce quantities of grain handled through my elevator at [fol. 61] Guntersville and, if they remain in effect for a period of more than a few months, will force me out of business.

At the present time I am shipping grain by rail to customers at a number of destinations in the Southeast who are equipped to receive, unload and store multi-car shipments of grain. Among these customers are Security Mills, Jacksonville, Florida; Morbutt Milling Company, Augusta, Georgia; McMillan Milling Company, Monroe, North Carolina; Western Grain Company, Birmingham, Alabama; Cosby Hodges Milling Company, Birmingham, Alabama; Allstar Milling Company, Albermarle, North Carolina; Spartan Grain and Milling Company, with two plants located at Spartanburg and Newberry, South Carolina; Eagle Roller Mills Company, Shelby, North Carolina; Carolina Milling Company, Laurene, South Carolina; W. A. Davis, Highpoint, North Carolina; and Farmers Exchange Cooperative with two plants located at Lumberton, North Carolina and Columbia, South Carolina. I have been advised by most of these companies and by grain brokers through whom they purchase, that if the multi-car rates go into effect on August 7, 1962, they will immediately abandon purchases of barge-rail grain from me and will rely on the much cheaper multi-car rates.

At Guntersville, Alabama I own a shelling plant, grain dryer, an elevator, rail siding and dock facilities with a marine leg for unloading barges. My elevator and related facilities had a reasonable value of $500,000.00 before the Southern Railway proposed the multi-car rates now under investigation. I had received a bona fide offer to purchase those facilities at that figure. The mere proposal of these rates posed a threat to my continued ability to merchandise [fol. 62] barge grain throughout the Southeast and caused the withdrawal of that offer. The value of my business was reduced by at least 50%. If these proposed rates go into effect and remain in effect for a period of six months, my

entire business will be virtually worthless and I will be compelled to close my doors.

The following will illustrate the adverse effect these rates will have on my business.

The proposed multi-car rate from St. Louis to Birmingham is $3.12 per ton, a reduction of $5.58 from the present rate of $8.70. The barge-rail combination from St. Louis to the same destination is $5.48 per ton and the barge-truck combination from St. Louis to Birmingham is $5.07. Obviously no grain buyer at Birmingham can pay a $1.95 premium to buy barge grain from me.

The multi-car rate from St. Louis to Spartanburg, South Carolina is $4.60 per ton, a reduction from the present rate of $11.30. The barge-rail combination from St. Louis to Spartanburg via Guntersville is $9.08 per ton. Again my customers at Spartanburg would be required to pay $4.48 per ton premium in order to continue to do business with me.

The multi-car rate from St. Louis to Augusta, Georgia will be $5.14 per ton, a reduction from the present rate of $11.70. The barge-rail combination from St. Louis to Augusta via Guntersville is $7.88 per ton. My customers at Augusta cannot afford to pay the $2.74 per ton premium which would be necessary in order for them to continue doing business with me.

[fol. 63] The same situation prevails with respect to grain from Evansville to the same destinations. In the case of my customers at Birmingham, they would be required to pay a premium of $2.12 per ton in order to buy grain from me on the lowest combination of barge-truck from Evansville to Birmingham. The premium for barge-rail grain at Spartanburg would be $5.03 and the premium at Augusta would be $3.31 per ton.

These illustrations should be sufficient to establish the immediate and devastating effect that the proposed rates will have upon my business at Guntersville.

My records show that thus far in 1962 I have shipped almost one million bushels of grain from my elevator at Guntersville to purchasers in the Southeast who are presently equipped to rec[illegible]e, unload and store multi-car shipments. This represents about 30% of my total sales for the year. The percentage is less than last year because

the threat of the multi-car rates has discouraged purchases. If the proposed rates go into effect on August 7, each of these purchasers will be able to purchase grain at the gateways and ship it all-rail to their plants at a tremendous saving in transportation charges. The result will be that immediately after August 7 my total sales volume will drop dramatically, and my barge-rail shipments will dwindle to nothing. In fact, my customers who buy barge-rail grain have cut back their purchases in anticipation of the multi-car rates. Our sales of grain for barge-rail delivery already have dropped by 75%. Those customers are letting their storage bins go empty so they can begin using the multi-car rates on August 7. The damage to me will be immediate, great and irreparable.

[fol. 64] None of the grain which I purchase is consumed locally in Guntersville. All of it is transported from Guntersville to interior points. Guntersville is not a major grain consuming point. My rail facilities at Guntersville are not adequate to permit me to receive, store and unload multi-car shipments. Even if I were so equipped, I could not make use of the rates because the transportation charge beyond Guntersville to the areas of consumption would make me non-competitive with grain shipped directly to those same destinations on multi-car rates.

O. J. Walls

Subscribed and sworn to before me, a Notary Public, on this the 24 day of July, 1962. Joe Starnes, Jr., Notary Public. My commission expires: 22 March 1966.

[File endorsement omitted]

[fol. 65] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

MOTION OF SOUTHERN RAILWAY COMPANY TO DISMISS—
Filed August 1, 1962

Defendant Southern Railway Company, a corporation, hereby moves to dismiss the action on the following grounds:

1. The complaint fails to state a claim upon which relief can be granted.

2. The court is without jurisdiction of the subject matter.

3. The court is without jurisdiction to grant the relief sought in the complaint.

Southern Railway Company, Defendant, By: Jos. F. Johnston, Leigh M. Clark, Maxwell Alston, 9th Floor, First National Building, Birmingham 3, [fol. 66] Alabama; William D. McLean, James L. Tapley, William P. Stallsmith, Jr., Southern Railway System, P. O. Box 1808, Washington 13, D. C.

Certificate of Service

I hereby certify that a copy of the foregoing Motion to Dismiss has been served on plaintiffs' attorneys, this ..... day of ....., 1962.

....., Of Counsel for Defendant, Southern Railway Company.

[fol. 67] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

ANSWER OF SOUTHERN RAILWAY COMPANY TO COMPLAINT—
Filed August 1, 1962

First Defense

The complaint fails to state a claim against defendants, including Southern Railway Company, upon which relief can be granted.

Second Defense

Defendant, Southern Railway Company, denies the allegations of Paragraphs I, VII, IX, X, XI, XII, XIII and XIV of the complaint. There is no Paragraph VIII in the complaint.

Defendant admits the allegations in sub-paragraphs numbered 1 through 8 of *Paragraph II*, and denies the remaining allegations of *Paragraph II*.

[fol. 68] Defendant admits the allegations of sub-paragraphs (a) through (e) of *Paragraph III*, the first sentence of sub-paragraph (d), sub-paragraph (e), and denies the remaining allegations of *paragraph III*.

Defendant admits the allegations of the first and third sentences of *paragraph IV*, and denies the remaining allegations, as constituting erroneous characterizations as well as being conclusions of law.

Defendant admits the allegations in the first three sentences of *Paragraph V*, and denies the remaining allegations therein. Defendant further states, as set forth in the affidavit of James D. Tapley, Esquire, attached and made part hereof, that protesting parties by their own actions reflected in the excessive length of presentation of their evidence as well as the manner of such presentation,

and the extremely protracted and unduly time consuming cross-examination of defendant's witnesses, have directly caused the magnitude of the record in I. & S. No. 7656 and the fact that the case is still in hearing before the Examiner. Continuation of such methods by the protesting parties, and in particular continuation of protracted and unduly time consuming cross-examination of defendant's witnesses, will delay by protestants' own acts completion of the hearing until some date still to be determined.

Defendant admits the allegations of *Paragraph VI* and further states that Southern Railway Company, the public, including shippers of grain to and receivers of grain in the Southeastern states of Alabama, Georgia, Florida, Tennessee, Kentucky, North Carolina and South Carolina have been deprived of the benefit of Southern's multiple car rates and the service thereunder for approximately twelve full months. As set forth in the affidavit of Robert S. Hamilton, attached hereto and made part hereof, defendant's rates will produce revenues substantially in excess of out-of-pocket costs, and have as their primary purpose to enable Southern to meet the competition of unregulated [fol. 69] long-haul truck transportation of grain into the aforesaid Southeastern states, such unregulated truck transportation constituting by far the major individual portion of the grain movement into the Southeast. Southern's multiple car rates on grain, now before the Interstate Commerce Commission in its Docket I. & S. No. 7656, entitled *Grain in Multiple Car Shipments—River Crossings to the South*, have been made possible by substantial technological advances on the part of defendant, Southern, both in railroad equipment and in the art of railroad transportation. Southern is seeking to pass the benefits of such technological advances on to the public, including shippers of grain to and receivers of grain in the aforesaid Southeastern states, through the medium of the instant multiple car grain rates. The public interest in the availability of those multiple car rates far outweighs the unsubstantiated and exaggerated claims of prospective injury advanced by the plaintiffs herein. The affidavit of Robert S. Hamilton, attached hereto, further indicates that Southern's multiple car rates have received the strong support of receivers of

grain throughout the aforesaid Southeastern states, as well as the Southern Governors' Conference, the Association of Southeastern Utilities Commissioners, the United States Department of Agriculture, etc. Southern's multiple car rates will promote vigorous competition between long haul transportation of grain by unregulated truck and by railroad into the Southeast, with barge transportation continuing to supply a significant portion of the grain to be transported to the Southeast (a) for movement beyond destination ports, or (b) for processing into products of grain such as soybean meal, animal and poultry feeds, and flour and subsequent distribution thereof. No mode of transportation, whether truck, rail or barge, will have anything even remotely resembling a monopoly of the grain movement into the aforesaid Southeastern states.

[fol. 70] Third Defense

The multiple car rates of defendant, Southern Railway Company, are before the Interstate Commerce Commission in its Docket I. & S. No. 7656, *Grain in Multiple Car Shipments—River Crossings to the South*, and are under the Commission's regulation, supervision and other jurisdiction. By virtue of the explicit, unequivocal language of the provisions of Section 16 of the Clayton Act, 15 U.S.C. 26, the instant action brought by plaintiffs does not lie and is null and void.

Fourth Defense

Plaintiffs are among the protesting parties actively participating in the hearings before Examiner W. W. Peck of the Interstate Commerce Commission in its Docket I. & S. No. 7656, *Grain in Multiple Car Shipments—River Crossings to the South*. As set forth in the affidavit of James L. Tapley, Esquire, attached hereto and made part hereof, and earlier discussed in the Second Defense, *supra*, page two, by their own actions in the extreme length of presentation of their evidence, as well as the manner of such presentation, the unduly time consuming cross-examination of defendant's witnesses, etc., the protesting parties by their own acts have prevented the completion of hear-

ings and submission of the case to the Interstate Commerce Commission for its decision. Contrary to well-established principles of equity and equity procedure, these protesting parties are here seeking to exploit the judicial process in reliance upon present circumstances and conditions in the aforesaid Interstate Commerce Commission Docket I. & S. No. 7656 which they and their associated protesting parties have themselves directly brought about. For this additional substantial reason plaintiffs' action does not present any valid basis for equitable relief and is null and void.

[fol. 71] Fifth Defense

Under date of March 23, 1962 several protesting parties, including two of the instant plaintiffs, Arrow Transportation Company and City of Guntersville, presented a motion to the Interstate Commerce Commission for an order requiring cancellation of the multiple car grain rates of defendants, including Southern Railway Company, on the ultimate grounds that said rates were unlawful. This motion had followed submission of the direct case of the defendants, including Southern Railway Company. The protesting parties' motion, following submission of replies by defendants, was denied by the entire Interstate Commerce Commission under date of May 4, 1962. The Interstate Commerce Commission continues to retain supervision, regulation and jurisdiction of defendants' multiple car rates on grain to the Southeast in the aforesaid Docket I. & S. No. 7656. Plaintiffs, notwithstanding the foregoing, by their complaint as private parties here seek, by injunction and/or temporary restraining order to interfere with the business and transaction of defendant interstate rail carriers of sufficient public significance and importance to be within the jurisdiction of the Interstate Commerce Commission. Their complaint does not present a proper case for the exercise of the equity powers of this Honorable Court, and is null and void.

Wherefore, defendant, Southern Railway Company prays that this Honorable Court dismiss the complaint for preliminary injunction and/or temporary restraining order and/or other relief.

Dated at Birmingham, Alabama this 30th day of July, 1962.

Southern Railway Company, Defendant, By: Joseph F. Johnston, Cabaniss & Johnston, First National Bank Building, Birmingham 3, Alabama; William D. McLean, James L. Tapley, William P. Stall-
[fol. 72] smith, Jr., Attorneys, 15th & K Streets, N. W., Washington 13, D. C., Attorneys for Southern Railway Company, Defendant.

Duly sworn to by William D. McLean, jurat omitted in printing.

[fol. 73] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10,224

[Title omitted]

MEMORANDUM—August 2, 1962

During the afternoon of Friday, July 27th, last, Judge Grooms and attorneys representing plaintiffs in this case discussed same with me briefly. It was explained to me that this case was one of great and vital importance to all parties concerned, that time was of the essence. Due to the fact that Judge Lynne was on vacation and that Judge Grooms had scheduled his vacation to begin August 1st, the purpose of this conference was to see if my August docket, which is unusually heavy with work, could be interrupted and rescheduled so that an early hearing could be set on motions for preliminary injunction or other relief. At that time I found the earliest date available on my calendar to be [fol. 74] August 13th and agreed to set aside my planned work for that day so that this matter might be heard, if necessary.

A complaint was filed by plaintiffs on July 27th. On August 1st a motion for preliminary injunction was filed. Answer together with motion to dismiss was filed on August 1st by defendants.

On the morning of July 30th a conference was arranged in chambers attended by attorneys representing plaintiffs, and by attorneys representing the Southern Railroad, one of the defendants in this case. In a general discussion it was agreed that due to the expiration of the suspension of the proposed rates pursuant to Title 49, U.S.C., Section 15(7) of the Interstate Commerce Act, an early hearing was most important and necessary. It was then agreed that the Court would set aside its schedule for August 1st and set this case together with all motions on that date.

Another conference was held in chambers during the afternoon of July 31st, called by counsel for plaintiffs, for the purpose of advising the Court that proper service had not been obtained on all defendants and to request that the hearing be reset for August 13th. The defendants being represented at the conference, it was agreed that due to the close time element trial would be had as originally planned on August 1st.

After some discussion I indicated to counsel for plaintiffs that I seriously doubted that this Court has jurisdiction of the subject matter and that at that time, without [fol. 75] having had time to properly research the question and with only a bare outline of the facts involved in the case, I was not convinced that the Court should grant the injunctive relief sought.

In the brief time allowed I have been unable to find authority that would remove the doubt as to jurisdiction from my mind. The cases so ably cited by counsel for plaintiffs in briefs and in brilliant oral arguments do not help. To me there are some important factors contained in those cases not found in this case. While the opinion of Judge Lynne, and I know of no Judge whose opinion would have more weight with me, would be most helpful as to the subject matter in this case should the Court have jurisdiction, his opinion in *Arrow Transportation Company v. United States of America and others*, 176 Fed. Supp. 411,

does not help me on the question of jurisdiction in this case. This is true of the other cases cited by plaintiffs.

Defendants, relying strongly on *The Great Northern Railway Company* case, 281 U. S. Reports 412, have also failed to offer authority that completely satisfies the Court on the question of jurisdiction in this case. Arguments of counsel, however, together with the Court's research have continued and increased the Court's doubt as to jurisdiction.

Since hearing the oral arguments in this case presented brilliantly by learned counsel and after diligent research and as thorough study of briefs as time would allow, I have come to the conclusion, and it is my judgment, that this Court does not at this time have jurisdiction of the subject matter and is without jurisdiction to grant the relief sought in the complaint.

[fol. 76] At the same time I am of the opinion that there may be grave danger that irreparable injury loss or damage may be inflicted on plaintiffs unless the defendants are enjoined from applying the tariff schedules published by them and presumed to go into effect on August 7th, or unless the suspension of the proposed rates is further extended by agreement. I have in conference strongly recommended a sixty-day further suspension of the rates by agreement. This the defendants for good reasons of their own have been unable to do.

I am particularly concerned by this estimated period of approximately sixty days during which the proposed rate decrease will automatically go into effect and during which period plaintiffs will have no adequate remedy at law and will have only the doubtful protection of legal remedy under Title 49, Section 8, of the Interstate Commerce Act. Once the Commission renders a decision in the case the parties have adequate and well-defined remedies at law; therefore, I have convinced myself that should this Court have jurisdiction of this matter, it should consider all of these matters most carefully and deliberately before denying injunctive relief to plaintiffs. At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to

urge the Commission to greater speed in determining this issue but to be sure that the parties conclude the hearings as speedily as possible. However, lacking jurisdiction, I find myself powerless to grant the relief sought; therefore, at this time it is the judgment of the Court that the motion [fol. 77] for preliminary injunction be, and the same is hereby denied. At the same time I am denying defendants' motion to dismiss this case.

The Court requests counsel for defendants to submit findings of fact, conclusions of law and order at the earliest possible date.

Dated this the 2nd day of August, 1962.

C. W. Allgood, United States District Judge.

[fol. 78] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10,224

[Title omitted]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER—
August 3, 1962

This cause came on to be heard on August 1, 1962, on motion and prayer of plaintiffs for a preliminary injunction. Defendant Southern Railway Company having filed motion to dismiss and answer appeared by counsel. Defendant Louisville & Nashville Railroad Company appeared by counsel and waived prior service of the complaint and notice of the time of hearing. Defendants St. Louis-San Francisco Railway Company and Seaboard Air Line Railroad Company appeared by counsel and waived service and notice of hearing. The Tennessee Valley Authority appeared by its General Counsel as *amicus curiae* in support of plaintiffs' motion.

The application was heard on the verified complaint and answer and on affidavits filed on behalf of plaintiffs and of defendant Southern Railway Company and on arguments of counsel. The court handed down its memorandum at 2:00 P.M., on August 2, 1962.

[fol. 79] The court makes the following findings of fact:

1. Plaintiffs and defendants are parties to a proceeding now pending before the Interstate Commerce Commission entitled Docket No. I. & S. 7656, *Grain in Multiple Car Shipments—River Crossings to the South.* Plaintiffs seek in this court to maintain the status quo pending a final Commission decision on the merits in that proceeding.

2. The averments contained in paragraph II-A of the complaint are true.

3. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs.

4. The averments in paragraph III (a), (b), (c) and (e) of the complaint are true, and the averments in the first sentence of paragraph III (d) are true. The City of Guntersville is interested in this action for the reason that it believes that its grain industry is in great jeopardy in the event the tariff schedules under investigation by the Commission in I. & S. Docket 7656 became effective, and believes that same will endanger the prosperity, welfare and common good of its citizens.

5. During the year 1961 the defendants published tariff schedules proposing to reduce their rates and charges on the transportation of grain in multiple car shipments from certain Ohio and Mississippi River ports to numerous destinations in the southeast, which rates, according to the verified complaint filed as an affidavit herein and other affidavits filed herein, will be substantially lower than existing rates.

[fol. 80] 6. On protest of interested parties, the Interstate Commerce Commission entered an order on August 7, 1961, finding that "There is reason to believe that they [the tariffs] ould, if permitted to become effective, result in rates and harges, rules, regulations or practices which

would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy . . . ", and suspending the effectiveness of the proposed tariffs for the maximum statutory period of 7 months pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The Commission set the investigation hearings to begin in October 1961.

7. It is admitted by the defendants that the Interstate Commerce Commission hearings scheduled for October 1961 were postponed to January 6, 1962 at Southern Railway Company's request because of its change of counsel and that the railroads agreed to extend the suspension period to July 7, 1962. It is also admitted by the defendants that counsel for the Southern Railway Company became ill during the hearings, that by reason thereof the hearings were interrupted, and that the railroads agreed to extend the suspension period to August 7, 1962. Such delay caused by the Southern Railway Company was compensated by further extension granted by the Southern.

8. The tariff schedules published by the defendants which are currently under investigation by the Commission in I. & S. Docket 7656 will go into effect at 12:01 A.M. on August 7, 1962 unless the suspension period is extended by the defendants or unless the defendants are enjoined from putting them into effect by a court of competent jurisdiction.

[fol. 81] 9. The hearings before the Commission in I. & S. Docket 7656 began on January 6, 1962 and are still in progress. It is agreed by the parties that the Commission will not be able to enter a final order before August 7, 1962.

10. The plaintiffs are contending before the Commission that the proposed tariff schedules are unjust, unreasonable, discriminatory and destructive and will violate the Interstate Commerce Act and the National Transportation Policy.

11. Defendants have declined to comply with plaintiffs' requests that they agree to extend the suspension period for another sixty days.

12. There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law.

Conclusions of Law

1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates.

2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate Commerce Com-
[fol. 82] mission before the entry of a final order by the Commission approving the rates. The only jurisdiction of a Court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court, upon complaint filed against the United States as a necessary defendant, to review the order of the Commission.

Wherefore, it is hereby Ordered:

1. That the motion for a preliminary injunction and a temporary restraining order be and the same is hereby denied.

2. That the motion of defendant Southern Railway Company that the complaint be dismissed and the same is hereby denied.

This 3rd day of August, 1962.

C. W. Allgood, United States Judge.

[fol. 83] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

MOTION FOR A TEMPORARY INJUNCTION DURING THE PENDENCY OF THIS APPEAL—Filed August 3, 1962

Come the Plaintiffs in the above-styled cause, and pursuant to the provisions of Rule 62(c) of the Federal Rules of Civil Procedure, move this Honorable Court to grant an injunction during the pendency of the appeal to the Circuit Court of Appeals, for the Fifth Circuit, upon such terms as to bond, or otherwise, as it considers proper for the security of the rights of the Plaintiffs in order that the status quo with respect to the proposed tariff schedules published by the Defendants, which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656—*Grain in Multiple Car Shipments —River Crossings to the South*, be maintained until the [fol. 84] determination of the appeal by the Circuit Court of Appeals.

The administrative decree of the Commission, as well as the decision of the Circuit Court of Appeals, will be rendered ineffective and the Plaintiffs will sustain immediate and irreparable injury, loss and damage, unless, pending final decision by the Court of Appeals, the Defendants are prevented by a Stay Order of this Court from placing said tariff schedules into effect.

Sirote, Permutt, Friend & Friedman, By Morris K. Sirote; Lovett & Lovett, By John C. Lovett; Joe Starnes, Jr., City Attorney of Guntersville, Alabama, Attorney for City of Guntersville, Attorneys for Plaintiffs.

Duly sworn to by Morris K. Sirote, jurat omitted in

[fol. 85] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

ORDER DENYING STAY ORDER PENDING APPEAL—
August 3, 1962

This matter coming on to be heard upon the application by the Plaintiffs for a Stay Order pending appeal, pursuant to the provisions of Rule 62 (c) of the Federal Rules of Civil Procedure, and the Court having considered the same, the Court finds that, for the reasons set out in the Order denying the Plaintiffs' application for a temporary injunction this day entered in this cause, the Court is without power or jurisdiction to exercise discretion to grant the relief prayed for in this Motion, and that the same should be denied.

It is, therefore, by the Court, Ordered that the application for a Stay Order pending appeal before the Circuit Court of Appeals be, and the same is hereby denied.

(2) This Order shall be without prejudice, however, to the right of the Plaintiffs to make a similar application for relief before the Court of Appeals, pursuant to the provisions of Rule 62 (g) of the Federal Rules of Civil Procedure.

Done and Ordered this 3rd day of August, 1962.

C. W. Allgood, District Judge.

[fol. 86] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

NOTICE OF APPEAL—Filed August 3, 1962

Notice is hereby given that plaintiffs, Arrow Transportation Company, a corporation, O. J. Walls d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., a corporation, and City of Guntersville, Alabama, a municipal corporation, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the order of the Honorable Clarence Allgood, Judge of the United States District Court for the Northern District of Alabama, Southern Division, denying plaintiffs' application for a preliminary injunction, entered in this action on August 3, 1962.

Arrow Transportation Company, a corporation; O. J. Walls d/b/a O. J. Walls Company and John D. Bagwell Farms & Hatchery, Inc., a corporation, By: Morris K. Sirote, of Sirote, Permutt, Friend & Friedman, By: John C. Lovett, of Lovett & Lovett, Attorneys for plaintiffs;

City of Guntersville, Alabama, a municipal corporation, By: Joe Starnes, Jr., Attorney for City of Guntersville.

[fol. 87] Acknowledgment of Service (omitted in printing).

[fol. 88] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 10224

[Title omitted]

BOND FOR COSTS OF APPEAL—Filed August 3, 1962

We the undersigned, jointly and severally, acknowledge that we and our personal representatives are bound to pay to defendants, Southern Railway Company, a corporation, Louisville & Nashville Railroad Company, a corporation, St. Louis-San Francisco Railway Company, a corporation, and Seaboard Airline Railroad Company, a corporation, the sum of Two Hundred Fifty Dollars ($250.00).

The condition of this bond is that, whereas plaintiffs have appealed to the Court of Appeals for the Fifth Circuit by notice of appeal filed August 3, 1962, from the judgment of this Court entered August 3, 1962. If the plaintiffs shall pay all costs adjudged against them if the appeal is [fol. 89] dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Arrow Transportation Company, By H. G. King,
Its President, Plaintiff,
Morris K. Sirote, John C. Lovett, Sureties.

Signed and acknowledged before me this 3rd day of August, 1962. Mary L. Tortorici, Chief Deputy Clerk, U. S. Dist. Court.

[fol. 90] Designation of Contents of Record on Appeal —Filed August 3, 1962 (omitted in printing).

[fol. 90a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 91]
[Handwritten notation—Filed Aug. 3, 1962, Walter P. Gewin, U. S. Circuit Judge]

[Stamp—U. S. Court of Appeals—Filed—Aug 8 1962—Edward W. Wadsworth, Clerk]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19928

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, d/b/a O. J. WALLS COMPANY, JOHN D. BAGWELL FARMS & HATCHERY, INC., a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation, Appellants,

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation, Appellees.

MOTION FOR AN INJUNCTION TO PRESERVE THE STATUS QUO PENDING APPEAL

To the Honorable Judges of Said Court:

Come now the Appellants in the above styled cause and move this Honorable Court as follows:

1. To enter a temporary restraining order to maintain the status quo, restraining and enjoining the Appellees from applying to the rail transportation of grain the tariff schedules published by them, as hereinafter more fully described, said temporary restraining order to remain in effect until the hearing and determination of Appellants' application for an injunction to preserve and maintain the said status quo by a Three-Judge Panel of this Court to be convened at Montgomery, Alabama, on August 8, 1962.

[fol. 92] 2. That upon the hearing of Appellants' application for a temporary injunction before said Three-Judge Panel, that the Court enter a temporary injunction to preserve and maintain the status quo, enjoining and restraining the Appellees from applying to the rail transportation of grain the said tariff schedules published by them, said injunction to remain in effect pending this appeal and until the entry by this Court of a final order relating thereto.

3. The grounds in support of this motion are as follows:

(a) Appellees published certain rates and charges on the transportation of grain from certain Ohio and Mississippi river ports to specified destinations in the Southeast. The rates are under investigation by the Interstate Commerce Commission in Docket No. I & S 7656—*Grain in Multiple Car Shipments, River Crossings to the South*, pursuant to an investigation and hearings undertaken by it under an order finding that

> "there is reason to believe that they (the proposed rates) would, if permitted to become effective, result in rates and charges, rules and regulations or practices which would be unjust or unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and competitive practices in contravention of the National Transportation Policy."

(b) Pursuant to the order and findings above set out, the Interstate Commerce Commission suspended such proposed rates for seven (7) months, or until March 9, 1962, in accordance with the provisions of Title 49 U.S.C., Sec. 15(7) of the Interstate Commerce Act, which provides that the Commission may suspend proposed rates for not longer than seven (7) months, beyond the time they would otherwise go into effect.

[fol. 93] (c) Appellants further allege that it has been the custom and practice on the part of common carriers, whose proposed rates are under investigation by the Interstate Commerce Commission to voluntarily extend the effectiveness of such rates beyond the seven months' period,

while such investigation is still in progress, and pending the ultimate determination by the Commission of the lawfulness thereof. In accordance with such practice and custom, as well as because of certain delays in the hearings by the Commission brought about at the instance and request of the Appellees, the Appellees voluntarily extended the effective date of the proposed rates from March 9, 1962, to August 7, 1962. The Appellees have, however, declined to further extend the effective date of such rates beyond August 7, 1962, both upon request of the Appellants, as well as upon the strong recommendation of the learned Court below, as will be hereafter shown.

(d) On, to-wit, July 27, 1962, Appellants filed their verified Bill of Complaint in the Court below whereby the Appellants sought equitable relief to maintain the status quo as to said rates, until the Commission shall have completed its investigation and rendered a decision as to their lawfulness. Appellants sought no relief in the Court below, and do not now seek any relief here, which would in any way interfere with the pending investigation before the Commission, or which would involve any decision of the lawfulness of said rates, all of which is within the exclusive jurisdiction of the Commission. They seek solely to maintain the status quo in an area where the Commission is powerless to grant relief, in order to prevent immediate, substantial and irreparable injury and damage to the Ap- [fol. 94] pellants, as will be hereinafter more fully set out. This is in accordance with the well established rule that a court of equity will intervene by way of a temporary injunction as an aid in the administrative process in advance of final administrative action.

4. Jurisdiction of the suit below was founded on (1) diversity of citizenship and amount, (2) the existence of a federal question and amount in controversy arising under the Constitution and laws of the United States by virtue of Title 28 U.S.C. Section 1331, and (3) on the existence of a federal question arising under particular statutes, Title 28 U.S.C. 1337, giving district courts original jurisdiction under statutes regulating commerce, and Title 15 U.S.C.

Section 26, relating to injunctive relief from anti-trust violations.

5. On, to-wit, August 1, 1962, Appellants moved the Court for an order granting Appellants a preliminary injunction, enjoining the Appellees from applying said tariff schedules so published by them, until the entry by the Interstate Commerce Commission of a final order relating thereto. On August 2, 1962, the Court below, after hearing, upon due notice to the Appellees, entered a memorandum opinion and order, recognizing that Appellants were entitled to equitable relief to avoid great irreparable harm and damage, but denied Appellants' application for a temporary injunction on the sole ground that the Court, in its opinion, was powerless to act for lack of jurisdiction of the subject matter. A true and correct copy of the memorandum opinion of the Court below is attached hereto as Exhibit "A".

[fol. 95] 6. The ruling of the Court below is erroneous and is contrary to clearly established principles of law found in numerous decisions of the Federal Courts, as set out in the Brief and Argument filed by Appellants in support of this motion, and there is more than strong probability that Appellants will prevail both before the Commission and on this appeal.

7. Appellants have applied for relief to the Court below under the provisions of Rule 62(c) of the Federal Rules of Civil Procedure, for an injunction maintaining the status quo during the pendency of the appeal, but the Court below erroneously assumed that it had no discretion to grant such relief and denied the same on the sole ground that it lacked jurisdiction to act in the premises, without prejudice, however, to the right of the Appellants to seek this relief here.

8. The administrative decree of the Interstate Commerce Commission, as well as the judgment of this Court on this appeal, will be rendered ineffective, and the Appellants will sustain immediate, substantial and irreparable injury and damages, for which Appellants have no adequate rem-

edy at law, unless, pending final decision of this appeal, the injunctive relief prayed for is granted by this Honorable Court, all as more fully appears in the record of the proceedings below.

Sirote, Permutt, Friend & Friedman, By Morris K. Sirote; Lovett & Lovett, By John C. Lovett; Joe Starnes, Jr., City Attorney of Guntersville, Alabama, Attorneys for Appellants.

[fol. 96] *Duly sworn to by John C. Lovett, jurat omitted in printing.*

[fol. 97]

EXHIBIT "A" TO MOTION

Memorandum opinion of Judge C. W. Allgood, dated August 2, 1962 omitted. Printed on page 52, side folio 73 ante.

[fol. 101]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

19928

[Title omitted]

[Stamp—U. S. Court of Appeals—Filed—Aug 8 1962—Edward W. Wadsworth, Clerk.]

TEMPORARY RESTRAINING ORDER—Dated August 3, 1962

This cause coming on to be heard on the motion of the plaintiffs-appellants for a temporary restraininng order; and due notice having been given to the defendants-appellees and all parties having been represented by counsel present in court who presented arguments for the respective parties and the Court having before it and having considered the record in the cause and having considered the arguments of counsel, portions of the record in the proceedings before the United States District Court for the Northern Dis-

trict of Alabama, Southern Division, and being fully advised in the premises and of the equities involved, it finds that the District Court concluded that it was without jurisdiction in the premises and that the District Court further found:

> [fol. 102] "At the same time I am of the opinion that there may be grave danger that irreparable injury loss or damage may be inflicted on plaintiffs unless the defendants are enjoined from applying the tariff schedules published by them and presumed to go into effect on August 7th, or unless the suspension of the proposed rates is further extended by agreement. I have in conference strongly recommended a sixty-day further suspension of the rates by agreement. This the defendants for good reasons of their own have been unable to do.
>
> "I am particularly concerned by this estimated period of approximately sixty days during which the proposed rate decrease will automatically go into effect and during which period plaintiffs will have no adequate remedy at law and will have only the doubtful protection of legal remedy under Title 59, Section 8, of the Interstate Commerce Act."

It appears to this Court from the record that the defendants-appellees are about to apply to rail transportation of grain the tariff schedules published by them which are currently under investigation by the Interstate Commerce Commission, Docket No. I & S 7656—*Grain in Multiple Car Shipments—River Crossings to the South,* which will cause immediate irreparable injury, loss and damage to the plaintiffs-appellants in that the plaintiffs-appellants will lose very substantial amounts of freight traffic and will be irretrievably deprived of substantial freight revenues; and an appeal having been taken by the plaintiffs-appellants to the United States Court of Appeals for the Fifth Circuit from the order, judgment and decree of the United States District Court for the Northern District of Alabama, Southern Division:

Now, Therefore, it is hereby Ordered and Decreed:

1. That pending further order of this Court, each and all of the defendants-appellees, their respective officers, agents, servants, representatives, employees, attorneys and successors and all other persons in active concert or participation with them be, and they hereby are temporarily restrained and enjoined from directly or indirectly applying to the rail transportation of grain the tariff schedules [fol. 103] published by them which are currently under investigation by the Interstate Commerce Commission in Docket No. I & S 7656—*Grain in Multiple Car Shipments —River Crossings to the South*, until 11 o'clock a.m. on Wednesday, August 8, 1962, and for such period of time thereafter as may be required by a panel of this Court to hear, determine and pass upon the motion of the plaintiffs-appellants for a temporary restraining order.

2. The plaintiffs-appellants are ordered and directed to file their bond, together with corporate surety, to be approved by the Court, in the sum of $10,000.00, conditioned for the payment of such costs, expenses and damages as may be incurred or suffered by any of the defendants-appellees herein, in giving notice and information of this order, but not including loss of revenue resulting from the issuance of this order.

3. Said motion is set for hearing before a panel of this Court in the Courtroom of the United States Court of Appeals for the Fifth Circuit, Montgomery, Alabama, at 11 o'clock a.m. on Wednesday, the 8th day of August, 1962.

4. Said hearing shall be upon the record certified upon appeal from the District Court of the United States for the Northern District of Alabama, Southern Division, and upon typed briefs, at least four legible copies to be filed.

Done at Tuscaloosa, Alabama, at 6:40 p.m. this the 3rd day of August, 1962.

Walter P. Gewin, United States Circuit Judge.

Filed Aug. 3, 1962
Walter P. Gewin, U. S. Circuit Judge

[fol. 104]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19928

[Title omitted]

[Stamp—U. S. Court of Appeals—Filed—Aug 8 1962—Edward W. Wadsworth, Clerk.]

BOND FOR TEMPORARY RESTRAINING ORDER

Whereas, Appellants have applied to this Court for a temporary restraining order against the Appellees, enjoining and restraining them from the commission of certain acts as in the application therefor more particularly described;

Now Therefore, the undersigned, Arrow Transportation Company, a corporation of the State of Illinois having its principal office and place of business in Sheffield, Alabama, Principal, and

Fidelity and Casualty Company of New York

as Surety, in consideration of the premises and of the issuing of a temporary restraining order, does hereby undertake in the sum of of Ten Thousand Dollars ($10,000.00) and promise that if a temporary restraining order shall [fol. 105] issue, the Appellants will pay to the parties enjoined such damages, not exceeding the sum of Ten Thousand Dollars ($10,000.00), as they may sustain by reason of the temporary restraining order, if the Court finally decides that the Appellants were not entitled thereto.

In Witness Whereof, the Principal and Surety have caused this undertaking to be signed by its duly authorized officers at Tuscaloosa, Ala., this 3rd day of August, 1962.

Arrow Transportation Company, a corporation, By: Howard G. King, Its President; Fidelity and Casualty Company of New York, By: Louise B. Noland, Its: Attorney in Fact.

(Seal)

The foregoing bond is hereby approved this 3 day of August, 1962.

Walter P. Gewin, Circuit Judge.

Filed Aug. 3, 1962
Walter P. Gewin, U. S. Circuit Judge.

[fol. 106]

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, That the FIDELITY AND CASUALTY COMPANY OF NEW YORK has made, constituted, and appointed, and by these presents does make, constitute, and appoint

Louise B. Noland of Tuscaloosa, Alabama

its true and lawful attorney for it and in its name, place and stead to execute on behalf of the said Company, as surety, bonds, undertakings and contracts of suretyship to be given to

all obligees

provided that no bond or undertaking or contract of suretyship executed under this authority shall exceed in amount the sum of FIFTY THOUSAND ($50,000) DOLLARS.

This Power of Attorney is granted and is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Board of Directors of THE FIDELITY AND CASUALTY COMPANY OF NEW YORK at a meeting duly called and held on the 16th day of October, 1957:

> "RESOLVED, that the Chairman of the Board, the President, an Executive Vice President or any Vice President of the Company, be, and that each or any of them hereby is, authorized to execute Powers of Attorney qualifying the attorney named in the given Power of Attorney to execute in behalf of THE FIDELITY

AND CASUALTY COMPANY OF NEW YORK, bonds, undertakings and all contracts of suretyship; and that any Secretary or any Assistant Secretary be, and that each or any of them hereby is, authorized to attest the execution of any such Power of Attorney, and to attach thereto the seal of the Company.

FURTHER RESOLVED, that the signatures of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed and in the future with respect to any bond, undertaking or contract of suretyship to which it is attached."

In Witness Whereof THE FIDELITY AND CASUALTY COMPANY OF NEW YORK has caused its official seal to be hereunto affixed, and these presents to be signed by one of its Vice Presidents and attested by one of its Secretaries this 31st day of March, 1959.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK

By /s/ CARROLL R. YOUNG
Vice-President

Attest:

/s/ F. J. MILLER
Secretary

(Corporate Seal)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 31st day of March, 1959, before me personally came Carroll R. Young, to me known, who being by me duly sworn, did depose and say: that he resides in Berkeley Heights in the County of Union, State of New Jersey, at 23 Ridge Drive East; that he is a Vice-President of THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, the corporation described in and which executed the

above instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

/s/ ROBERT J. METTALIA

ROBERT J. METTALIA
Notary Public—State of New York
No. 41-2675700
Qualified in Queens County
Certificate Filed in New York County
Term Expires March 30, 1961

(Notary Seal)

CERTIFICATE

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, the undersigned, a Secretary of THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a New York corporation, DO HEREBY CERTIFY that the foregoing and attached Power of Attorney remains in full force and has not been revoked; and furthermore that the Resolution of the Board of Directors, set forth in the said Power of Attorney, is now in force.

Signed and sealed at the City of New York. Dated the 3rd day of August, 1962.

/s/ F. J. MILLER
Secretary

(Corporate Seal)

Bond 4315A

[fol. 107] [File endorsement omitted]

[fol. 108]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19928

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, D/B/A O. J. WALLS COMPANY, JOHN D. BAGWELL FARMS & HATCHERY, a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation, Appellants,

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation, Appellees.

MEMORANDUM OF APPELLANTS IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION—Filed August 8, 1962

Sirote, Permutt, Friend & Friedman
and
Morris K. Sirote
First Federal Building
Birmingham 3, Alabama

John C. Lovett
Benton, Kentucky

Joe Starnes, Jr.
Guntersville, Alabama

[fol. 109]

Preface

This action is before this Court on Appellants' motion for a preliminary injunction to preserve the status quo of the parties until the Court can hear and determine Appellants' appeal from an order of the United States District Court for the Northern District of Alabama, Southern Division. A temporary restraining order was entered by Judge Walter P. Gewin on August 3, 1962, to preserve the status quo until 11:00 A.M. on August 8, and such time thereafter as may be required for the Court to pass upon Appellants' motion for a preliminary injunction.

Statement of the Facts

This case represents another chapter in the history of the barge lines' struggle to survive as common carriers on the Tennessee River. See *Arrow Transportation Co., et al.* vs. *United States* (N.D. Ala. 1959), 176 F.Supp. 411, Affirmed 361 U.S. 353.

During the year 1961, the Appellees published tariff schedules proposing drastic reductions in rail rates on the transportation of grain in multiple car shipments from [fol. 110] certain Ohio and Mississippi River ports to numerous destinations in the southeast (Findings of Fact, Par. 5). The proposed rates apply only to minimum shipments of 450 tons (about 16,000 bu.) and carry a $2.40 per ton minimum. They do not apply to barge grain transshipped from Guntersville, Alabama to those destinations. Guntersville is an important Tennessee River port where large volumes of barge grain are presently unloaded, stored, and transshipped to the southeast (King Supp. Aff.).

The enormity of these reductions is illustrated in the following table in King's supplemental affidavit:

COMPARISON OF ILLUSTRATIVE RATES PRESENT AND PROPOSED

	From St. Louis			From Guntersville		
To	Miles	Present	Proposed	Miles	Present	Proposed
Atlanta, Ga.	601	$10.10	$3.86	139	$3.10	None
Birmingham, Ala.	472	8.70	3.12	71	2.20	None
Gainesville, Ga.	654	10.50	4.17	192	3.30	None
Orangeburg, S.C...	847	12.50	5.27	385	6.00	None
	From Evansville			From Guntersville		
Atlanta, Ga.	441	8.30	3.98	139	3.10	None
Birmingham, Ala.	361	7.10	2.67	71	2.20	None
Gainesville, Ga.	494	8.90	3.28	192	3.30	None
Orangeburg, S.C...	687	10.90	4.36	385	6.00	None

Barge Rate: St. Louis, Mo. to Guntersville — $2.39
Evansville, Ind. to Guntersville— 2.11
Transfer charge at Guntersville— .89

[fol. 111] The following comparisons are taken from Walls' affidavit:

	From St. Louis			From Guntersville	
To	Present All-Rail	Proposed All Rail	Present Barge-Rail Via Guntersville	Rail Present	Rail Proposed
Birmingham, Ala...	$ 8.70	$3.12	$5.48	$2.20	No Change
Spartanburg, S.C...	11.30	4.60	9.08	5.80	No Change
Augusta, Ga.	11.70	5.14	7.88	4.60	No Change

Barge Rate: St. Louis to Guntersville— $2.39
Transfer Charge, Barge to Rail Car — .89

Complaint was made to the Interstate Commerce Commission which found that there was reason to believe that the rates may be unlawful and ordered them suspended for the maximum statutory period of seven months pending investigation. Because of some delays, the suspension period was voluntarily extended by the railroads to 12:01 A.M. on August 7, 1962. The hearings before the Commission are continuing (Findings, Par. 6, 7, 8). The railroads have refused Appellants' request that they voluntarily extend the suspension period (Findings, Par. 11), and, except for the restraining order entered on August 3 by this Court, the rates would already have been placed into effect by the Appellees.

[fol. 112] Affidavits filed in support of the verified complaint establish that these drastically reduced rates, once they become effective, will divert large grain traffic from the Tennessee River to the railroads, will deprive Appellant Arrow of 80% of its total revenue, and will force it to surrender its certificate as a common carrier barge line (King Aff. and Supp. Aff.). They will force Appellant O. J. Walls, an independent grain merchant at Guntersville who transships eight million bushels of barge grain to the southeast annually, to close his doors (Walls Aff., P. 2, 3). They will force Appellant John D. Bagwell to invest $150,000.00 in facilities to receive, unload (in 24 hours) and store 16,000 bushel shipments or suffer an intolerable competitive disadvantage as against the national grain

companies who are his main competitors in the production of broilers and who already are equipped to handle multiple car rail shipments (Bagwell Aff. p. 1, 2). They will have a "devastating effect" on the economy of Guntersville where are located many grain industries dependent to a large degree upon inbound barge movements of grain (Martin Aff. p. 2).

The Court below found that:

> [fol. 113] "There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law." [Findings, p. 4]

Appellants sought the aid of the equity court below to prevent this irreparable injury. They asked for a preliminary injunction to maintain the status quo until the Commission can complete the hearings and enter a final order adjudicating whether the proposed rates are lawful. Appellee Southern Railway filed a verified answer and a motion to dismiss. The other railroads appeared by counsel but filed no responsive pleadings. Hearing was had on August 1, 1962 by agreement of parties. The Tennessee Valley Authority, on oral motion, was given leave to file its brief as *amicus curiae* and make argument in support of the Appellants' motions (Findings, p. 1).

At 2:00 P.M. on August 2, the Court below handed down its memorandum opinion, and on August 3 entered its Findings of Fact, Conclusions of Law and Order in which it denied Appellants' motion on jurisdictional grounds. The memorandum stated, *inter alia*:

> [fol. 114] "At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in determining this issue but to be sure the parties conclude the hearings as speedily as possible (Court's Memorandum, p. 4).

Appellants then moved for a temporary injunction during the pendency of the appeal to this Court pursuant to

[fol. 111] The following comparisons are taken from Walls' affidavit:

	From St. Louis			From Guntersville	
To	Present All-Rail	Proposed All-Rail	Present Barge-Rail Via Guntersville	Rail Present	Rail Proposed
Birmingham, Ala...	$ 8.70	$3.12	$5.48	$2.20	No Change
Spartanburg, S.C...	11.30	4.60	9.08	5.80	No Change
Augusta, Ga.	11.70	5.14	7.88	4.60	No Change

Barge Rate: St. Louis to Guntersville— $2.39
Transfer Charge, Barge to Rail Car — .89

Complaint was made to the Interstate Commerce Commission which found that there was reason to believe that the rates may be unlawful and ordered them suspended for the maximum statutory period of seven months pending investigation. Because of some delays, the suspension period was voluntarily extended by the railroads to 12:01 A.M. on August 7, 1962. The hearings before the Commission are continuing (Findings, Par. 6, 7, 8). The railroads have refused Appellants' request that they voluntarily extend the suspension period (Findings, Par. 11), and, except for the restraining order entered on August 3 by this Court, the rates would already have been placed into effect by the Appellees.

[fol. 112] Affidavits filed in support of the verified complaint establish that these drastically reduced rates, once they become effective, will divert barge grain traffic from the Tennessee River to the railroads, will deprive Appellant Arrow of 80% of its total revenue, and will force it to surrender its certificate as a common carrier barge line (King Aff. and Supp. Aff.). They will force Appellant O. J. Walls, an independent grain merchant at Guntersville who transships eight million bushels of barge grain to the southeast annually, to close his doors (Walls Aff., P. 2, 3). They will force Appellant John D. Bagwell to invest $150,000.00 in facilities to receive, unload (in 24 hours) and store 16,000 bushel shipments or suffer an intolerable competitive disadvantage as against the national grain

companies who are his main competitors in the production of broilers and who already are equipped to handle multiple car rail shipments (Bagwell Aff. p. 1, 2). They will have a "devastating effect" on the economy of Guntersville where are located many grain industries dependent to a large degree upon inbound barge movements of grain (Martin Aff. p. 2).

The Court below found that:

> [fol. 113] "There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law." [Findings, p. 4]

Appellants sought the aid of the equity court below to prevent this irreparable injury. They asked for a preliminary injunction to maintain the status quo until the Commission can complete the hearings and enter a final order adjudicating whether the proposed rates are lawful. Appellee Southern Railway filed a verified answer and a motion to dismiss. The other railroads appeared by counsel but filed no responsive pleadings. Hearing was had on August 1, 1962 by agreement of parties. The Tennessee Valley Authority, on oral motion, was given leave to file its brief as *amicus curiae* and make argument in support of the Appellants' motions (Findings, p. 1).

At 2:00 P.M. on August 2, the Court below handed down its memorandum opinion, and on August 3 entered its Findings of Fact, Conclusions of Law and Order in which it denied Appellants' motion on jurisdictional grounds. The memorandum stated, *inter alia*:

> [fol. 114] "At this time I am of the opinion that the ends of justice would be best served by granting temporary injunctive relief for a limited period of time, not to urge the Commission to greater speed in determining this issue but to be sure the parties conclude the hearings as speedily as possible (Court's Memorandum, p. 4).

Appellants then moved for a temporary injunction during the pendency of the appeal to this Court pursuant to

Rule 62(c) of the Federal Rules of Civil Procedure. The Court below, stating that it was "without power of jurisdiction to exercise discretion to grant the relief," denied the motion without prejudice to Appellants' right to seek similar relief in the Court of Appeals.

This appeal followed. At 2:30 P.M. on August 3, the Honorable Walter P. Gewin, Judge of this Court, conducted a hearing in Tuscaloosa, Alabama, at which all parties were represented by counsel. At 6:40 P.M. he entered a temporary restraining order restraining the Appellees from placing the reduced rates into effect until 11:00 A.M. on August 8, 1962, or for such time thereafter as may be required for a panel of this Court to pass upon Appellants' motion for a preliminary injunction preserving the status quo until the appeal from the Court below can be decided.

[fol. 115]

ARGUMENT

I

This Court Has Power to Maintain the Status Quo Pending an Appeal

This Court possesses broad power to enter such orders as it may deem necessary to preserve the status quo pending this appeal. Rule 62(g) of the Federal Rules of Civil Procedure provides that the Rules "do not limit any power of an appellate court or of a judge thereof or a justice thereof to stay proceedings during the pendency of an appeal . . . or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

The "all-writs" statute [28 U.S.C. Sec. 1651] is the basic source of this power to preserve the status quo. It authorizes all federal courts "to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This power extends to the restraining of administrative decrees to preserve the status quo pending an appeal from that decree. *Scripps-Howard Radio, Inc.* vs. *Federal Com-*

[fol. 116] *munications Commission*, 316 U.S. 4, 86 L.ed. 1229. It assuredly extends to an original suit in equity to restrain the defendants from committing acts which, unless restrained, will cause irreparable injury to Appellants during the pendency of the appeal. This is an inherent power to prevent the defeat or impairment of the Court's jurisdiction of the appeal.

II

The Court Below Had Jurisdiction to Grant the Temporary Injunction

It is the view of some courts that status quo injunctions should not be issued without some showing by the parties who will suffer irreparable damage that they have a meritorious case on appeal. Therefore, the ultimate question to be decided on appeal will be discussed briefly.

The Court below, without citing authority, held that Section 15(7) of the Interstate Commerce Act [49 U.S.C. 15(7)] grants to the Interstate Commerce Commission "exclusive authority" to suspend proposed railroad rates, and [fol. 117] that the courts have no authority to enjoin the rates until the entry of a final order by the Commission, at which time jurisdiction vests in the statutory three-judge court [28 U.S.C. 2321, et seq.].

Section 15(7) of the Act reads:

> "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers

affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make [fol. 118] such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified.[1]

Does this Act of Congress impliedly deprive the federal district court of its inherent equity power to preserve the status quo pending trial in order to prevent irreparable injury? We submit that it does not.

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[1] This was a part of the Mann-Elkins Act, June 18, 1910, 36 Stat. 551. Congress gave little thought to harmful rate *decreases*: Senator Heyburn, on the day before the Senate voted on Section 15(7), expressed his concern:

"Little or no consideration seems to have been given to the advisability of including decreases in rates under the amendment. . . ." [61 Cong. Rec. 6792, May 24, 1910]. See: Senate Report 355, pp. 8-9, 61st Congress, 2nd Sess. (1910).

[fol. 119]

a. *The Language of Section 15(7) Is Silent on the Subject*

The Act protects shippers adversely affected by *increases* in rates, later found to be unlawful, by requiring the railroads to keep accurate records and make refunds. However, it prescribes no remedies for competing carriers adversely affected by *decreases* in rates which are later found to be unlawful. See Judge Brown's opinion in *Amarillo-Borger Express* vs. *United States*, 138 F.Supp. 411. On this subject the Act is silent.

The intrinsic equity powers of the district courts should not be abrogated or lessened without clear and unmistakable statutory language manifesting that Congressional intent.[2]

[fol. 120] The powers of the equity court to serve the ends of justice are, we submit, too basic and fundamental to be lightly taken away. Some strong statutory language evidencing positive Congressional intent should be required.[3]

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[2] It was said in *Scripps-Howard Radio, Inc.* vs. *Federal Commun. Com.*, 86 L.ed. 1229, 316 U.S. 4:

"It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal. (Citing Cases) . . . [p. 9, 10]

"The search for significance in the silence of Congress is too often the pursuit of a mirage. . . . [p. 11]

"Unless Congress explicitly discloses such an intention we should not lightly attribute to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard." [p. 15]

[3] Note the strong language in Sec. 7421(a), 1954 Internal Revenue Code: "Except as provided in sections 6212(a) and (c) and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." See: *Enochs* vs. *Williams Packing & Nav. Co., Inc.*, May 28, 1962, —— U.S. ——, 8 L.ed. 2d 292.

b. *Construing the Act as Depriving the Equity Courts of Jurisdiction Will Violate the Due Process Clause*

If the language of Section 15(7) that rates "shall go into effect at the end of such period" is construed to forbid a temporary injunction where, as here, that injunction is Appellants' only remedy to prevent immediate, substantial, and irreparable injury, such construction would be unconstitutional.

It is clear that a business or occupation is property within the protection of due process of law, *Liggett Co.* vs. *Baldridge*, 278 U.S. 105, 111 (1928); *Frost* vs. *Corporation Comm'n.*, 278 U.S. 515, 519-20 (1929). That the above cases apply with respect to circumstances confronting the plain-[fol. 121] tiffs here is emphasized in *Pacific Inland Tariff Bureau* vs. *United States*, 129 F.Supp. 472, at 477, where the Court stated:

> "By permitting the railroads to reduce their rates, the Commission has, in effect, required the motor carriers to reduce their rates. To deny the motor carriers the opportunity to have such rates judicially reviewed is indistinguishable in practice from a denial of an opportunity to challenge rates directly imposed upon them."

Statutes are to be construed to avoid constitutional difficulties, and, despite broad language in the statute, courts will generally apply the familiar canon that of two possible constructions, the courts adopt the one which will save and not destroy. The courts should not attribute to Congress an intent to defy the Fifth Amendment or even to come so near to doing so as to raise a serious question of constitutional law.

Due process requires more than an *incomplete hearing*. It requires a decision. The Act should not be construed so as to permit the Appellants to be bankrupted before their rights are adjudicated.

[fol. 122]

c. *Construing the Act as Destroying the Equity Power of the Court to Enjoin Will Produce Unequal Operation Thereof*

It is clear that the Interstate Commerce Commission cannot further suspend the rates. It cannot provide Appellants a remedy because its power is exhausted. It is impotent.

It is also clear that the statute creating the three-judge court provides no remedy. It does not yet have jurisdiction to restrain these rates because there has been no *order* entered by the Commission which is ripe for review.[4] Therefore, the jurisdiction of the three-judge court has not yet vested.

The Act itself provides no remedy for victims of a rate decrease. While persons damaged by *increases* are protected by statute, persons damaged by *decreases* are ignored.

Only the inherent equity powers of the district court provide a remedy to Appellants. If Section 15(7) is inter-
[fol. 123] preted as impliedly taking away that remedy, that interpretation will produce an unequal operation of the Act.

"Nothing but unmistakable language will warrant such construction of a statute as will produce unequal operation thereof." *L. B. Wilson, Inc.* vs. *Federal Communications Commission*, 170 F.2d 793, 800 (D.C. Cir. 1948). See also *Shaddock* vs. *Gallagher*, 218 F.2d 428, 429 (6th Cir. 1955); *Adams* vs. *Pitts*, 140 F.Supp. 618, 621 (E.D.S.C. 1956).

Hence, the inherent equity power of the federal district courts is the only remedy available to Appellants. That a temporary injunction be available to prevent irreparable injury from rate reductions, while reparations serve a similar purpose with respect to rate increases, is a fair and impartial construction of Section 15(7) that nothing in its language can be said clearly and specifically to forbid.

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[4] Such a court may "enjoin, set aside, annul or suspend" only an *order* of the Interstate Commerce Commission [28 U.S.C. 2321, et seq.]. Until an order is made, that court has no jurisdiction. *Shannahan* vs. *United States*, 20 F.Supp. 1002 (N.D. Ind. 1937), Aff'd. 303 U.S. 596, 82 L.ed. 1039 (1938).

III

The General Equity Power of a Federal Court to Restrain Rates From Going Into Effect at the End of the Seven Months Period Has Been Invoked in Other Cases

We have found only one case in which a district court has been called upon to restrain a carrier from placing [fol. 124] rate reductions into effect at the end of the seven months period. Evidently few such cases have arisen, perhaps because destructive rate reductions are an innovation; perhaps because "it appears to be the universal practice of all regulated carriers concerned to agree to a continuation of a suspension once issued" (*Amarillo-Borger Express* vs. *United States*, supra, p. 414).

That case is *Pacific Inland Tariff Bureau* vs. *United States* (D.C. Ore. 1955), 129 F.Supp. 472, in which drastic reductions in rail rates on petroleum were suspended seven months by the Interstate Commerce Commission and were scheduled to become effective on December 9, 1953. On June 9, six months prior to the effective date, the case was submitted to the Interstate Commerce Commission on the record, briefs and oral argument. The Commission's decision approving the rates was issued December 4. Plaintiffs telegraphed a petition for reconsideration and a request for a stay to the Commission on December 6. Having failed to receive an answer, plaintiffs applied to the district court for temporary restraining order prohibiting the Commission and the railroads from putting the reduced rates into effect at the end of the suspension period. This was not a statutory three-judge court procedure at this juncture. [fol. 125] The United States was not made a party as is required by that statutory procedure (28 U.S.C. 2322). There had been no *final* order of the Commission which would vest jurisdiction in the three-judge court. The railroads attacked the court's jurisdiction to restrain the railroads from putting the rates into effect.

On final hearing before the three-judge court (after the Commission's order had been finalized by overruling plaintiff's petition for rehearing), the equity jurisdiction of the court to extend the suspension period by injunction was

affirmed. This was authorized, said the court, "where there is a showing of immediate and irreparable injury flowing from an inadequacy of the prescribed administrative procedure."[5]

A similar case is *Cantlay & Tanzola* vs. *United States* S.D. Cal. 1953, 115 F. Supp. 72, in which the Interstate Commerce Commission decision was issued on January 12, [fol. 126] 1953, only 23 days before the suspension period was to expire. The Interstate Commerce Commission refused to stay its order. Plaintiffs obtained a temporary restraining order in district court enjoining the railroads from putting the rates into effect. The railroad's motion to dissolve was denied and the restraining order remained in force pending hearing before the three-judge court on the application for a preliminary injunction. The court held that judicial intervention to restrain rates, in advance of final administrative action, was warranted by the danger of irreparable injury to plaintiffs. The Court rejected the railroad argument (which is made here also) that "'the court lacks power . . . when reviewing an order of the Commission, to enjoin the railroads, either temporarily or permanently, from publishing particular proposed rates'; that an injunction such as that embodied in the temporary restraining order entered in this case, so the argument goes, 'amounts to a suspension of the rates; a function which Congress has seen fit to delegate exclusively to the . . . Commission and not to the courts.'"

The Court said:

> "Nowhere does there appear any manifestation of Congressional intent to deprive the district courts of their [fol. 127] inherent equity jurisdiction to employ the writ of injunction in maintaining the *status quo* pending hearing and determination of an action, see United States v. United Mine Workers, supra, 330 U.S. at pages 290-295, 67 S. Ct. 677, 91 L. Ed. 884, or 'in afford-

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[5] The following quote from a modifying opinion of the court in 134 F.Supp. 210, indicates what was in the court's mind:

> "Bluntly stated, we fear that the proposed railroad rates, if approved, will drive the barge lines out of business." [213]

> ing relief which it was the purpose of Congress to ensure', whenever such a course is necessary to the effectiveness of the court's decree. The Chicago Junction Case, supra, 264 U.S. at page 270, 44 S. Ct. at page 321, 68 L. Ed. 667.", [p. 83]

Similarly, equity courts have not been hesitant to issue injunctions to preserve the status quo in proceedings before other administrative agencies where threatened irreparable injury warranted such action.

In *Isbrandtsen Co. vs. United States*, 81 F. Supp. 544, a temporary injunction was granted to maintain the status quo pending further proceedings to adjudicate the legality of certain agreements pending before the United States Maritime Commission until such agreements were ruled upon by the Commission in an adversary proceeding. Judge Rifkind wrote:

> "We are all in agreement that a temporary injunction should issue to maintain the status quo pending further proceedings to adjudicate the legality of the Conference agreements and the action contemplated pursuant thereto."

In *Pennsylvania Motor Truck Ass'n vs. Port of Philadelphia Marine Term. Ass'n*, 183 F. Supp. 910, a status [fol. 128] quo injunction was granted to restrain the effectiveness of a tariff rule being investigated by the Federal Maritime Board. With respect to the lack of conflict between equity relief and the doctrines of primary jurisdiction and exhaustion of administrative remedies, the Court said, at page 913:

> "At the outset, all parties agree that the jurisdiction to pass upon the *merits* of the basic controversy between the parties lies initially in the Federal Maritime Board, and not this Court . . . In short, it is the defendant's contention that the doctrines of 'primary jurisdiction' and 'exhaustion of administrative remedies' deprive this Court of jurisdiction. The controlling issue in this regard, however, is whether the instant action is of the type which is subject to the above doc-

trines. Plaintiff seeks, in this action but one type of relief—the maintenance of the status quo. The hub of its plea is that the Federal Maritime Board cannot, or will not, stay the enforcement of the disputed provision of the tariff pending its determination . . . Plaintiff, therefore, seeks the assistance of this Court merely as an aid in the administrative process." See also: *West India Fruit & Steamship Co. vs. Seatrain Lines*, 170 F. 2d 775.

While Congress in Section 15(7) has limited the power of the Commission to suspend rates, it contains no limitation on the power of the court to restrain rates to avoid irreparable injury. According to the recent judicial trend, [fol. 129] no such intent should be read into the Act.[6]

There is substantial text authority for the view that the courts can and should intervene to preserve the status quo protecting those who will be irreparably injured and whose administrative remedies are inadequate.[7]

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[6] See: 49 Columbia Law Review 1128. "The better view thus appears to be that courts of equity, upon request of an appropriate party, do have jurisdiction to provide temporary injunctive relief during the pendency of hearings before an administrative agency, even though the statute setting up the agency does not specifically so provide. This appears to be in accord with the recent judicial trend." *Atlantic Coast Line R. Co.* vs. *Macon Grocery Co.*, 166 Fed. 206 (5th Cir. 1909) (cited by Appellees), was decided before the Mann-Elkins Act was enacted and, while not in point, implies a different view. It reflects the philosophy of a half-century ago.

[7] "Preliminary resort to an administrative agency is not necessary where no administrative remedy is available to the litigant, or where the action presents matter beyond the power or jurisdiction of the agency to afford adequate remedy, or where the jurisdiction of the agency over the question involved is not exclusive." 73 C.J.S. Public Administrative Bodies and Procedure, p. 361, 362.

"Pending a proceeding before an administrative agency, the courts may grant injunctive relief to assist the agency in preserving the status quo until the administrative question before the agency has been determined by it. . . . The action in such cases is to protect, rather than to defeat, the jurisdiction of the agency which has the matter under consideration." *Supra*, p. 363.

[fol. 130] IV

The Lower Court Had Jurisdiction to Issue the Preliminary Injunction Under the Clayton Act

The verified complaint and McWilliams' affidavit state that the proposed rates are substantially all below the out-of-pocket cost of the rail service, and that the railroads are attempting, by charging rates below cost, to monopolize the transportation of grain, in violation of Section 2 of the Sherman Act. These charges are, of course, denied, creating a factual issue which should be resolved by the Court below. That Court had jurisdiction to decide that issue.

Section 2 of that Act states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . ." [15 U.S.C. 2]

The right of an equity court to enjoin threatened violations of the Sherman Act by Section 16 of the Clayton Act reads:

> "Any person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States [fol. 131] having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws . . . when and under the same conditions and principles an injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, that nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of chapters 1, 8, 12, 13, and 19 of Title 49,

in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission" [15 U.S.C. Sec. 26 emphasis supplied].

It is clear that under the above-quoted portion of the Clayton Act private persons are entitled to enjoin railroads to restrain threatened damage by a violation of the anti-trust laws if that remedy is not subject to the *jurisdiction* of the Interstate Commerce Commission, 15 U.S.C. 26; *Central Transf. Co.* vs. *Terminal R.R.* 288 U.S. 469 (1933). *Georgia* vs. *Pennsylvania R.R.*, 324 U.S. 455 (1945); *S.S.W., Inc.* vs. *Air Transport Ass'n of America* (D.C., Cir. 1951), 191 F. 2d 658, cert. denied 343 U.S. 955. Since the Com- [fol. 132] mission has no jurisdiction to extend the seven-month suspension period provided for in the Interstate Commerce Act (49 U.S.C. Sec. 15(7)), a barge owner seeking injunctive relief under section 16 is not within the prohibition in question.

In *S.S.W., Inc.* vs. *Air Transport Ass'n of America*, supra, the court said:

"... 'the antitrust laws can have only limited application to industries regulated by specific statute.' But, in view of the importance of the antitrust laws to the unregulated part of the economy, the rule has developed that *the mere existence of a regulatory statute does not result in complete withdrawal of the regulated industry from the* operation of the antitrust laws.... If, however, the regulatory agency has not been authorized to deal with the subject matter of the complaint, as was the case with the Interstate Commerce Commission and broad rate fixing combinations, the courts retain jurisdiction under the antitrust laws to grant relief [*Georgia* v. *Pennsylvania R.R.*, supra]. Thus in each case brought against a regulated company under the antitrust laws, the subject matter and remedy afforded by the regulatory statute are compared with that of the antitrust laws. If the latter either cover subject matter outside the scope of the Commission's power *or provide a remedy which the Commission may not give*, then

they remain in effect to that limited extent. This sort of approach gives the greatest possible effect to congressional intent." [191 F. 2d at 661-662; emphasis added].

[fol. 133] We are contending before the Commission that the proposed rates are unlawful as violative of the Interstate Commerce Act. However, the Commission has exhausted its jurisdiction to prevent their becoming effective. If they are also unlawful under the anti-trust laws, as we insist, the mere failure of the Commission to take action within seven-months' period should not leave the railroads free to pursue their unlawful objectives. Such clearly was not the Congressional intent.

Conclusion

We respectfully urge the Court to ponder carefully the effect of a denial of jurisdiction. If the Court is impotent, then any reduction in rates proposed by any carrier, rail, barge or truck, regardless of how violative it is of the Interstate Commerce Act or the Anti-Trust Act, and regardless of the irreparable injury it causes, will go into effect if the Commission fails to act within seven months. In fact, the more devastating the rate is, the more it departs from established rate making principles, and the more opposition it generates, the more likely it is that the [fol. 134] Commission will not act in seven months, and the rates will have to go into effect. Thus, competing carriers will be free to apply the law of the jungle rather than the laws of equity.

While the Commission is impotent, we respectfully submit that the Courts are not.

Respectfully submitted,

Sirote, Permutt, Friend & Friedman, By: Morris K. Sirote, First Federal Building, Birmingham 3, Alabama, By: John C. Lovett, Benton, Kentucky, Joe Starnes, Jr., Guntersville, Alabama, Attorneys for Appellants.

[fol. 135] Certificate of Service (omitted in printing).

[fol. 136] [File endorsement omitted]

[fol. 137]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19928

ARROW TRANSPORTATION COMPANY, a corporation, O. J. WALLS, D/B/A O. J. Walls Company, JOHN D. BAGWELL FARMS & HATCHERY, a corporation, CITY OF GUNTERSVILLE, ALABAMA, a municipal corporation, Appellants,

vs.

SOUTHERN RAILWAY COMPANY, a corporation, LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a corporation, SEABOARD AIRLINE RAILROAD COMPANY, a corporation, Appellees.

Before: Hon. Richard T. Rives, Hon. Warren L. Jones (Judge Jones not present), and Hon. Walter P. Gewin, United States Circuit Judges.

At: Montgomery, Alabama, August 8, 1962.

Transcript of Proceedings

Appearances:

For Appellants: Sirote, Permutt, Friend & Friedman and Morris K. Sirote (Morris K. Sirote and William West), John C. Lovett, Joe Starnes, Jr.

Amicus Curiae on behalf of Appellants: Charles J. McCarthy.

For Southern Railway Company: Cabaniss & Johnston (Joseph F. Johnston, Leigh M. Clark and Maxwell Alston), William D. McLean, John F. Donelan, S. S. Wilbanks, [fol. 138] Rushton, Stakely and Johnston (Marion Rushton).

Amicus Curiae on behalf of Southern Railway Company: Walker P. Johnson, Jr.

For Louisville & Nashville Railroad Company: Lange, Simpson, Robinson & Somerville (Henry E. Simpson).

Amicus Curiae on behalf of Appellees: Karl C. Grannan, Attorney, U. S. Department of Agriculture.

(The above cause coming on for hearing at Montgomery, Alabama, August 8, 1962, before the above constituted court, the following proceedings were had:)

Judge Rives: Gentlemen, the case before us this morning is Arrow Transportation Company and others against Southern Railway Company and others. And as I understand it, it is all a motion for a—for an injunction to preserve the status quo pending appeal. I would like, before calling for appearances, to make some explanation about the court. As you gentlemen know, this is not the usual time of year for the court to hold, but we do have, under our Fifth Circuit Rules and Practices, summer panels, panels that are appointed to hold in all matters of emergency that arise while the court is in vacation. The panel for this week consists really of Judge Warren L. Jones, Judge Gewin, and myself. Judge Jones is in Jacksonville, [fol. 138a] Florida, attending to other business, and it was inconvenient for him to be here; he is not present. Under the statute, I believe it is Section 46 of Title 28, a majority of the court constitutes a quorum, so that the legally constituted court before you gentlemen this morning is Judge Gewin and myself. Judge Jones has had an opportunity to see the briefs in the case. I leave to you gentlemen entirely whether you wish to enter a stipulation that in the event there should be any disagreement between Judge Gewin and myself Judge Jones should participate in the case upon the briefs; there is a possibility that that might be necessary to break a deadlock. Not that we have indicated any views in advance at all, but—and that is entirely a matter for you gentlemen to agree. If you want to think about it for a moment, or even—

Mr. Johnston: Entirely agreeable with me, your honor.

Mr. Lovett: It is entirely agreeable with the appellants.

STIPULATION RE: PARTICIPATION OF JUDGE JONES

Judge Rives: It may be stipulated, then, in this case that in the event there is any disagreement between Judges Jewin and Rives that Judge Jones will participate on briefs as a member of the court.

Mr. Lovett: (Nodded to indicate affirmative reply.)

APPEARANCES

Judge Rives: Stipulation made in open court; court reporter will take it down. I might then call for appearances on both sides; appellants? Are the appellants pres-
[fol. 139] ent, and will they enter appearances; please?

Mr. Lovett: John Lovett, Benton, Kentucky, attorney for the appellants, Arrow Transportation Company, O. J. Walls Company, and the John D. Bagwell Company.

Mr. Sirote: Morris Sirote, associated with Mr. Lovett for the appellants.

Mr. Starnes: Joe Starnes, Jr., for the City of Guntersville, Alabama.

Judge Rives: I believe there are some attorneys for the T.V.A. who filed a brief; they wish—

Mr. McCarthy: Yes, your Honor; I am Charles J. McCarthy, General Counsel for T.V.A.

Judge Rives: You appear as Amicus Curiae?

Mr. McCarthy: Appearing as Amicus Curiae.

Judge Rives: Your interest being with the appellants?

Mr. McCarthy: That is correct.

Judge Rives: I see. Appearances for the appellees?

Mr. Johnston: Joseph F. Johnston, Leigh M. Clark, and Maxwell Alston, of Birmingham; John Donelan, D-O-N-E-L-A-N, of Washington, D. C., and might I ask that—Mr. Donelan, who is here, is a distinguished member of the District of Columbia bar and is representing the railroads as chief counsel in the case pending before the Commission, and I would ask that Mr. Donelan be admitted for the purpose of appearance in this case.

Judge Rives: Very happy to have him; you will be ad-
[fol. 140] mitted ad hoc.

Mr. Johnston: Mr. William D. McLean, General Solicitor of the Southern Railway System, Washington, D. C., also

appearing, and Mr. McLean is a member of the bar of this court, I believe.

Mr. McLean: No, sir; I am not.

Mr. Johnston: He has been—

Mr. McLean: I have appeared in this court before.

Judge Rives: Mr. McLean will be admitted ad hoc, also.

Mr. Johnston: We have, also, counsel for—Amicus Curiae on the side of the several—Amicus Curiae on behalf of the appellees in the case, Mr.—

Mr. Grannan: I am Mr. Karl Grannan, we are filing a brief as Amicus Curiae; I represent the Department of Agriculture in Washington, D. C.

Mr. Johnston: Mr.—I ask that Mr. Marion Rushton appear, also, for the Southern, and there will be—I think he is delayed in arriving, Mr. Walker Johnson, Assistant Attorney General of the State of Georgia, who will appear and file a memorandum, Amicus Curiae, on behalf of the appellees I believe. I believe that is—oh, Mr. Henry Simpson.

Mr. Simpson: Henry Simpson, of the firm of Lange, Simpson, Robinson & Somerville, in Birmingham, appearing for the appellee, Louisville & Nashville Railroad Company.

[fol. 141] Judge Rives: That completes the appearances, I believe. Are the appellants ready for this hearing?

Mr. Lovett: Yes, sir.

Judge Rives: And are the appellees also ready?

Mr. Johnston: We are ready.

Judge Rives: Am I correct that this hearing is limited to a motion for an injunction to preserve the status quo pending appeal?

Mr. Lovett: Yes, sir.

Mr. Johnston: I would comment on that that I am prepared for the Southern, the Frisco, and the Seaboard, and I believe the L. & N. has—concurs, to submit this case on the appeal. It is—it is—perhaps would be a little irregular in the sense of the time for filing the briefs and that sort of thing, but it is our view that the issues on the restraining order and the issues on the basic case are so identical that no good purpose would be served by trying this thing in two bites, when in a sense we are now in the Court of

Appeals, and particularly in view of the fact that as we see it the primary issue of jurisdiction of the subject-matter is a matter that is, under the Federal Rules as we understand them, always before the court, we are willing and suggest that the submission be on the whole appeal at this time.

Judge Rives: Have you gentlemen had any discussion among counsel about that?

Mr. Johnston: No, sir; I have not had an opportunity [fol. 142] to discuss it with counsel. I make this suggestion in open court.

Mr. Lovett: If the court please, we have no desire to procrastinate or delay, and we would be perfectly willing that that be done, if we were given twenty-four hours in which to file a reply brief; we have not had that opportunity.

Judge Rives: Is that satisfactory?

Mr. Johnston: I think—just a moment, let me consult counsel. Let me say—that is entirely agreeable—

Judge Rives: Appellants' counsel wishes to make some further statement.

Mr. Johnston: We are troubled about the restraining order situation, obviously, if the court please, and let me say that—this without prejudice to our insistence that this restraining order should be immediately dissolved, we are of course entirely willing to accept the twenty-four hours reply on the—on the submission of the—of the appeal, itself; we are here to—to deal with the matter of the restraining order, and we would—we are—will at the proper time urge the court to—to dissolve that in any event today.

Mr. Lovett: If the court please, I have been reminded by my associate counsel that the delay of the mail might require forty-eight hours to get the brief in. That would be the maximum that we would request.

Judge Rives: Well, unless you gentlemen stipulate on the matter, and unless the court—we wouldn't want the status quo changed—we were to hear it on the merits. And [fol. 143] unless you gentlemen are willing to stipulate on the matter, I think we would have to hear it on the motion for an injunction to preserve the status quo pending appeal. We will take a brief recess, for five minutes, and let you all consider the matter if you like.

Mr. Johnston: We would sure appreciate it.

Judge Rives: Discuss it among yourselves; suppose we just take a brief recess then.

Mr. Johnston: Thank you, sir.

Judge Rives: You gentlemen consider the matter and discuss it among yourselves; we will take a five minute recess.

(At which time, 11:10 a.m., a recess was had until 11:20 a.m., at which time the hearing continued.)

Judge Rives: Have you gentlemen been able to agree upon anything, or what is your announcement?

Mr. Lovett: Yes, your honor; I think we have agreed upon a stipulation; that in order to submit the matter as swiftly as possible, we have agreed that within ten days the appellants will have the right to file a brief on the ultimate merits of the appeal, which has not yet been done, of course, and that the appellees will have five days thereafter in which to file a reply brief, and that the case will then be regarded as submitted to the court without further oral argument for opinion and order, subject to the court's approval, of course.

Judge Rives: That satisfactory to you?

Mr. Johnston: That is satisfactory to us. You under- [fol. 144] stand that is not—and we will deal with the matter of the restraining order; we are not agreeing to—to the continuation in effect of the restraining order, we will deal with that today in the argument.

Judge Rives: I may say, if we are going to consider it on the merits, gentlemen, I believe we would maintain the status quo until we do it, decide it; I don't want you to be under any misapprehension about that. You would resist that, I am sure, and I wouldn't want—wouldn't stipulate to it, but I think the court would not want the status quo changed.

Mr. Johnston: I wouldn't—I would hope the court wouldn't make a decision on the argument that we are going to make here today in advance of the argument, because we think that that would be—a wrong answer for the court to—to continue the restraining order without—without listening to this thing today.

Judge Rives: Of course I may be jumping ahead and deciding that in advance, but I think—

Mr. Johnston: Because we are confronted here today—

Judge Rives: I didn't want you to be stipulating and prejudicing your position unnecessarily; we will be more inclined to continue the restraining order if we decide it immediately.

Mr. Johnston: What we have here today, of course, is a motion on the restraining order. The case is—has been [fol. 145] appealed and is—is docketed, I take it, or will be docketed on the regular appeal docket of the court, so we are here to argue the restraining order. Whether we agree or not to short circuit the final submission on the appeal, it doesn't seem to me should influence the court in determining the issue today as to whether or not it will enter a restraining order. If the thing goes on to the regular docket and is set up in November or January or whenever it would be, that will be all the more injury, as we see it, to the public in the question of these rates, and we, therefore are here to insist that this restraining order be —be removed. Now, if it is removed, we don't have any particular interest in expediting the appeal, but the appellants do, and I have simply said that we were willing to save the time of the court on further arguments and to short circuit the ultimate submission on this appeal; we are confident that we will persuade the court that the restraining order should be removed, but at that point it would be our interest to delay the appeal. Not to extend it we are willing to expedite the submission and to submit on briefs as stated by counsel within that period of time without further argument.

Judge Rives: Let me clearly understand then; if we—we will take the submission under your conception on the restraining—on the motion for the preliminary—injunction pending appeal today, now, in any event, however that may be ruled on, we will take submission on the merits with briefs to be filed. I expect under that situation it would be [fol. 146] understood that Judge Jones would participate in full on the merits, whether—whether there is any disagreement as between Judge—Judge Gewin and myself or not; so with the understanding, then, that we will hear

the arguments on motion for injunction to preserve the status quo pending appeal today, and we may announce or may not announce our ruling on that today, it is stipulated that the case will be submitted on briefs on the merits, and the briefs to be filed when?

Mr. Lovett: The briefs for the appellants to be filed within ten days, I suppose from today, and the briefs for the appellees within five days thereafter, and the court will take it under submission fifteen days from today.

Judge Rives: Very well. With that understanding, the court will not, of course, necessarily hold up any ruling on the restraining order pending the merits, we will hear from you all on argument on that. Now, how much time do you gentlemen wish for argument on the—on the motion for the preliminary—for the injunction pending appeal?

Mr. Lovett: We would expect that thirty minutes would suffice for the appellants.

Judge Rives: Thirty minutes; all right, sir.

Mr. Johnston: That will be agreeable with us.

Judge Rives: You may divide that in two as much as you please on opening and close, providing you make a fair statement of your issues on opening.

[fol. 147] Mr. Lovett: Thank you, sir. May I request the attitude of the court concerning two arguments to the side? Mr. Sirote and I would prefer to split our argument, if we might.

Judge Rives: That is entirely all right; you may have two counsels to the side arguing the case, and you—you want one or two, any number you may see fit.

Mr. Lovett: Then may I have fifteen minutes and Mr. Sirote ten, and say—ten, and two and say three minutes for rebuttal.

Judge Rives: You gentlemen keep time on yourselves for the division of time; we will keep the total on you. I don't suppose any of the Amicus Curiae—they filed briefs, and they don't care to argue orally.

Mr. McCarthy: I don't think I care to argue orally, your Honor.

Mr. Grannan: That is also our position.

Judge Rives: All right, sir. Very well, then, we will hear from the appellants.

Mr. Lovett: May it please the court—

Judge Rives: Come around to this table.

Mr. Lovett: As the court has indicated, this is before the court on a motion for a preliminary injunction to preserve this status quo pending the appeal.

Judge Rives: Now, Mr. Reporter, you need not take down the arguments.

[fol. 148] (At which time Messrs. Lovett, Sirote, Johnston and Donelan argued to the court, Mr. Lovett arguing further in rebuttal.)

Judge Rives: Gentlemen, the court is going to take a recess at this time for ten minutes. You come back at the end of that time, and we will have an announcement whether we have reached a decision or not. We will stand in recess for ten minutes.

(At which time, 1:03 p.m., a recess was had until 1:13 p.m., at which time the hearing continued.)

Judge Rives: Gentlemen, we have, of course, both studied this case as much as we could while it has been pending. We realize the necessity of a prompt decision on it. Our conclusion is this: The court considers that there is no reasonable prospect that the appellants will ultimately be successful upon this appeal, for the reason that the District Court was without jurisdiction, as more fully set forth in that court's opinion. The motion for injunction pending appeal is therefore denied. But in order to give the appellants a reasonable opportunity to seek further relief before the Supreme Court or Justice thereof, the temporary restraining order heretofore entered in this cause is continued in force to and including Saturday, August 11, 1962, and at the end of that date said temporary restraining order shall expire. That will be the judgment of the court. Court will stand in recess until two thirty, at which time we have a habeas corpus.

[fol. 149] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 150] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

19928

ARROW TRANSPORTATION COMPANY, a corporation, et al.,
Appellants,

versus

SOUTHERN RAILWAY COMPANY, a corporation, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama (Southern Division).

ORDER DENYING MOTION FOR INJUNCTION PENDING APPEAL—
August 8, 1962

Before Rives and Gewin, Circuit Judges.

Per Curiam:

The Court considers that there is no reasonable prospect that the appellants will ultimately be successful upon this appeal for the reason that the district court was without jurisdiction, as more fully set forth in that Court's opinion.

The motion for injunction pending appeal is therefore denied; but, in order to give the appellants a reasonable opportunity to seek further relief before the Supreme Court or a Justice thereof, the temporary restraining order heretofore entered in this cause is continued in force to and including Saturday, August 11, 1962, and at the end of that day said temporary restraining order shall expire.

Richard T. Rives, Walter P. Gewin, U. S. Circuit Judges.

Filed Aug 8/62
R. T. Rives, Judge

[fol. 151] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

ARROW TRANSPORTATION COMPANY et al., Applicants,

v.

SOUTHERN RAILWAY COMPANY et al.

Application for Extension of Temporary Restraining Order

OPINION—August 17, 1962

MR. JUSTICE BLACK:

This is an application for extension of a temporary restraining order granted by United States Circuit Judge Gewin on August 3, 1962, and temporarily continued by Circuit Judges Rives and Gewin on August 8, 1962. While applicants also ask in the alternative for "injunctive relief," this need not be considered because of my conclusion that they are entitled to have the temporary restraining order extended.

The complaint in the District Court was for an injunction to restrain the defendant railroads from putting into effect a reduction in railway rates for carrying grain in interstate commerce. The reduction was published in a tariff schedule filed with the Commission under authority of § 6(1) of the Interstate Commerce Act, 49 U.S.C. § 6(1). Under § 15(7) of that act the Commission can suspend such new rates for a maximum seven months' period pending hearings on their lawfulness, but if hearings are not completed within seven months the proposed rates "shall go into effect at the end of such period . . . ." Finding that the rates here involved might be "unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy," the Commission suspended the proposed tariffs but failed to

complete its hearings and enter a final order as to the lawfulness of the rates within the seven month period.
[fol. 152] After a brief voluntary suspension by the railroads, the plaintiffs brought this proceeding in the District Court for an injunction, invoking jurisdiction under 28 U. S. C. § 1331, the general federal question provision, § 1332, the diversity provision, and § 1337, which grants jurisdiction for cases arising under federal acts regulating commerce or protecting it against restraints and monopolies. The complaint shows diversity and federal questions and also charges the defendant railroads with conspiracy to violate the antitrust laws and with seeking to reduce rates so drastically that they would be below costs of transportation and would in some instances be below combined railroad-barge rates even if barges carried the grain substantially or wholly free. This latter consequence, it was charged, violates the policy declared by Congress and several times sustained by this Court designed to secure for barge transportation all inherent advantages it has which enable it to transport commodities cheaper than railroads. See note preceding 49 U. S. C. § 1; *Dixie Carriers, Inc.* v. *United States*, 351 U. S. 56 (1956); *I. C. C.* v. *Mechling*, 330 U. S. 567 (1947). See also *Arrow Transportation Co.* v. *United States*, 176 F. Supp. 411 (N. D. Ala. 1959).

The District Judge, after hearings and arguments, found that there was grave danger that putting the new rates into effect would inflict irreparable damages on the plaintiffs and that "the ends of justice would be best served by granting temporary injunctive relief for a limited period of time . . . ." He nevertheless refused to grant relief on the ground that he was without jurisdiction "to enjoin or suspend the effectiveness of rates published by common carriers and subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates." This lack of jurisdiction was apparently based on the court's interpretation of § 15(7) as not only depriving the Commission of jurisdiction to suspend rates longer than seven months but also [fol. 153] as completely ousting the jurisdiction of a federal court to grant any kind of relief from such rates, however

unlawfull, unreasonable, and unjust they might be and however deliberately destructive of barge competition.

The Court of Appeals refused to grant an injunction pending appeal by the plaintiffs because it believed that there was "no reasonable prospect" that the plaintiffs would "ultimately be successful" in reversing the District Court's holding that it had no jurisdiction. The Court of Appeals nevertheless continued Judge Gewin's temporary restraining order to give plaintiffs *the opportunity* to seek relief from this Court "or a Justice thereof."

I am not so sure as the judges of the Court of Appeals that plaintiffs are bound to fail in obtaining review by this Court of the crucial question of the District Court's jurisdiction. This Court has never decided that § 15(7) must be given an interpretation which so substantially destroys the jurisdiction of federal courts to restrain unlawful conduct which inflicts irreparable damage. The consequence is that I think the plaintiffs are entitled to have the temporary restraining order issued by the Court of Appeals extended in order to maintain the *status quo* pending final action in this Court on the question of the District Court's jurisdiction.

The railroads insist that plaintiffs should be required to give a bond of more than a half million dollars to compensate the railroads for loss of profits from anticipated gain traffic. Plaintiffs object on many grounds, one of which is that to require such a bond, which they claim they cannot make, would itself amount to a denial of relief. Both the District Court and the Court of Appeals refused to require plaintiffs to make a bond to compensate for anticipated losses in traffic. The Court of Appeals provided only that plaintiffs file a bond in the sum of $10,000.00, conditioned for the payment of such costs, expenses, and damages as might be incurred or suffered by any of the defendants in giving notice and information of its order but not including loss of revenue resulting from the issuance [fol. 154] of its order. I agree that this bond is sufficient. If for any reason the present bond is deemed to have expired or if it would not protect against the costs resulting from this extension, the parties are free to ask the Court of Appeals to require and approve a new bond in lieu of

the old one, to be filed with the clerk of that court, containing the same conditions, stipulations, and limitations.

The temporary restraining order of the Court of Appeals is hereby extended, pending the presentation to this Court of a petition for writ of certiorari to review the decision of the Court of Appeals denying an injunction pending appeal, and pending final consideration and action by this Court on that petition. Plaintiffs are directed to file such petition within 30 days from the date of this order.

[fol. 155] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962.

ARROW TRANSPORTATION COMPANY et al., Petitioners,

vs.

SOUTHERN RAILWAY COMPANY et al.

ORDER—August 17, 1962

Upon Consideration of the application of counsel for petitioners and of the opposition of the respondents thereto,

It Is Ordered that the temporary restraining order of the United States Court of Appeals for the Fifth Circuit of August 3, 1962 be, and the same is hereby, extended pending the presentation to and disposition by this Court of a petition for writ of certiorari to review the decision of said Court of Appeals of August 8, 1962 denying an injunction pending appeal. Such a petition for writ of certiorari shall be filed within thirty (30) days from this date.

The bond heretofore filed in the Court of Appeals pursuant to its order of August 3, 1962 shall be deemed to be sufficient but if, for any reason, said bond is deemed to have expired or if it would not protect against the costs resulting from this order, the parties are free to request said Court of Appeals to require and approve a new bond in lieu of said

bond. The conditions, stipulations and limitations of the original bond shall be incorporated in any such new bond and when approved, it shall be filed with the Clerk of the Court of Appeals.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 17th day of August, 1962.

[fol. 156] [File endorsement omitted]

[fol. 157]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19928

[Title omitted]

PETITION OF SOUTHERN RAILWAY COMPANY FOR REQUIREMENT OF BOND BY APPELLANTS—Filed August 27, 1962

Appellee Southern Railway Company respectfully requests that the Court require appellants to file a bond herein conditioned to protect appellees against the costs resulting from the restraining order entered by Mr. Justice Hugo L. Black. Justice Black's order of August 17 provides with respect to a bond:

> "The bond heretofore filed in the Court of Appeals pursuant to its order of August 3, 1962 shall be deemed to be sufficient but if, for any reason, said bond is deemed to have expired or if it would not protect against the costs resulting from this order, the parties are free to request said Court of Appeals to require and approve a new bond in lieu of said bond. The [fol. 158] conditions, stipulations and limitations of the original bond shall be incorporated in any such new bond and when approved, it shall be filed with the Clerk of the Court of Appeals."

It is clear under the applicable rule and authorities, as well as the terms of Justice Black's order, that appellees are entitled to a bond which would adequately cover their actual costs resulting from the stay.

Rule 65(c), Federal Rules of Civil Procedure, 28 U.S.C. Rule 65(c), provides:

> "(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . ."

The language of the applicable rule is clear and to the point. This entitles Southern Railway Company to security bond and the injunction must be denied or vacated if applicant fails to give such security. *Holahan* v. *Holahan*, 8 F.R.D. 221 (W.D. N.Y. 1948); *Allen* v. *Tyrone Mfg. Co.*, 111 F. Supp. 819, 820 (D. N.J. 1953).

In *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157 (1939), Mr. Justice Black referred to "the governing principle that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all —including the public—whose interests the injunction may affect." Here, of course, there is no way to protect the public against irreparable loss, but Southern at least has demonstrable costs which can be covered.

[fol. 159] The courts have recognized in setting the amount of the security that a precise and absolute figure in dollars and cents is not required in setting the costs and damages to be incurred or suffered as a measure of the bond. This is, of course, distinct from the proof of a claim on the bond if later submitted.

> ". . . Necessarily, at the beginning of an action, the amount of security adequate for a defendant's protection is a matter of estimate. . . ." *International L. Garment Work Un.* v. *Donnelly G. Co.*, 147 F. 2d 246, 252-253 (8th Cir.), cert. denied, 325 U.S. 852 (1945).

In *Bresnick & Co.* v. *United States*, 100 L.ed. 1510 (August 3, 1955) (not officially reported), an opinion by Mr.

Justice Harlan, granting in part and denying in part an application for stay of an injunction and supersedeas pending appeal, it was said, on the issue of securing the plaintiffs there:

> "... As I see it, the outside limit on the possible loss to the plaintiffs, should they ultimately succeed in their contentions, is the highest value that their stock might have attained, had Alleghany been subject to the Investment Company Act's requirements, and had no dilution of the plaintiff's equity by reason of 'conversion' taken place, during the pendency of this litigation. *I think a bond can be devised to cover such contingencies adequately, even though in the nature of things no precise estimate can be made of the possible future value of plaintiffs' stock.* ..." 100 L. ed. at 1513-1514. (Emphasis added).

Gordon Johnson Co. v. Hunt, 109 F. Supp. 571 (N.D. Ohio 1952) involved a suit and countersuit to enjoin certain patent infringements. Defendants' prayer for a preliminary injunction was granted. As to the proper amount of supersedeas bond to be required for a stay of the preliminary injunction, the court said:

> [fol. 160] "In the affidavit of one of plaintiff's accountants calculations appear and certain figures therein to support the claim of the plaintiff as to the loss which it would sustain by the granting of the injunction. Upon full consideration it is the opinion of the court that a stay bond should be approved in this case because of the preliminary nature of the order appealed from. *It would be impossible for the court accurately to determine the precise amount of loss and damage which the defendants may sustain by the stay of the injunction pending appeal,—the court can only approximate it* and, as I think, should fix the bond on the basis of a period of six months which ought certainly to cover the period of the pendency of the appeal." (Emphasis added).

Again, the court based the bond requirement on the best possible *estimate* from the record before it.

In view of Justice Black's memorandum, we do not include in the amount of bond now requested any protection for loss of profits, although we believe that appellees are entitled to recover such losses, but it is clear that actual allowance should be made in the security for all costs and expenses respondents will incur, which they would not otherwise have incurred, but for the injunction, stay or restraining order. See *Monolith Portland Mid. Co. v. Reconstruction F. Corp.*, 128 F. Supp. 824, 881 (S.D. Cal. 1955), modified (on different point), 240 F. 2d 444 (9th Cir. 1957), cert. denied, 354 U.S. 921 (1957). In that case, monetary damages were also assessed on an injunction bond for depreciation of the property involved, and interest.

[fol. 161] *The Amount of the Bond*

The bond heretofore filed by appellants has now expired by its terms and a new bond must now be required pursuant to Mr. Justice Black's order.

When bond was fixed by Judge Gewin upon entering his restraining order of August 3, it was in contemplation of a stay in the effectiveness of the rates of a very few days at the most. The rates were scheduled to go into effect on August 7 and this Court convened the following day and disposed of the issues. The restraining order was extended for three additional days.

The restraining order granted by Mr. Justice Black, however, is of an entirely different character in that it may continue for a matter of months. Obviously the $10,000 bond initially required is inadequate to cover the costs and damages which the appellee will sustain over this much longer period.

The attached affidavit of Robert S. Hamilton shows that Southern Railway is incurring very substantial costs each day it is restrained from putting the rates into effect. There is no possibility during this time of offsetting these costs and the losses sustained thereby are continuing and inescapable. The affidavit shows that the cost of ownership alone of the "Big John" cars, which were acquired solely for use in handling the new and additional traffic to be hauled under the suspended rates, amounts to $3510 per day. This affidavit also shows that additional units of motive

power have been acquired to haul this traffic and that in [fol. 162] the absence of this traffic, which can only be generated through the use of the suspended rates, these additional locomotive units are standing idle.

Justice Black's restraining order is to continue until disposition by the Supreme Court of a petition for certiorari in this case which he has directed appellants to file within 30 days from the date of his order. Presumably the Supreme Court will act on such petition within a reasonable time after it convenes in October, but it is not to be anticipated that such disposition would be within 60 days of the date of Justice Black's order.

It is also to be noted that the imposition of the restraining order has put appellee to considerable expense in the employment of counsel, reproduction of briefs, travel expenses and other costs which it would not have incurred had these restraining orders not been issued. Appellee does not at this time know the exact amount of such costs and consequently no request is made for bond to cover such costs. This is mentioned simply to show that the bond requested is in a minimum and exact amount.

Accordingly, appellee requests this Court to fix bond in the amount of the actual cost suffered by appellee in the amount of $3510 a day, representing the cost of ownership of the "Big John" cars, for a period of 60 days from August 17, 1962, or a total amount of $210,600 plus an additional $10,000 to cover the other costs provided in the Court's original bond, or a total of $220,600.

[fol. 163] Appellee further requests that this Court retain jurisdiction for the purpose of requiring additional bond of the same character as the bond here requested in the event that Justice Black's restraining order should continue in effect beyond 60 days from August 17, 1962.

The order requiring the bond should provide that it be filed and approved promptly. The period of 5 days is suggested as a reasonable time for such filing and approval.

Respectfully submitted,

Jos. F. Johnston, William D. McLean

Certificate of Service (omitted in printing).

[fol. 164]

ATTACHMENT TO PETITION

Affidavit

District of Columbia, ss.

Robert S. Hamilton, being duly sworn, deposes and says, that he is Vice President, Marketing and Research, Southern Railway System; that he is thoroughly familiar with the multiple-car rates on grain from river crossings to the Southeast now before the Interstate Commerce Commission in its Docket I & S No. 7656, *Grain in Multiple Car Shipments—River Crossings to the South;* that he has participated actively in the decisions of Southern Railway's management in connection with these grain rates and in connection with ensuring the availability of the necessary equipment and motive power to transport said grain under such rates; that Southern Railway System has purchased 500 "Big John" heavy loading aluminum hopper cars solely for the purpose of transporting additional grain traffic under these multiple car rates into the southeastern states; [fol. 165] that Southern is now being prevented from anything more than token use of these railroad cars in transporting such grain under the involved rates by virtue of the stay order of Mr. Justice Black of the Supreme Court of the United States entered on August 17, 1962; that new grain traffic under these rates, had they become effective, would have been available to Southern, requiring full use by Southern of said 500 "Big John" cars for transportation of grain to the southeastern states; that such "Big John" cars have received only sporadic and intermittent use since they were acquired, the total movement of grain in such cars through August 16, 1962, on short intrastate hauls and Government movements under these rates, being 1573 cars (equivalent to only three round trips for each of the 500 cars over a period in excess of one year); that such "Big John" aluminum hopper cars represent a major technological breakthrough on the part of Southern following long and expensive research and development; that the cost of ownership of said "Big John" hopper cars is $7.02 per car

per day, or $3510 per day for the fleet of 500 cars; that by virtue of the said stay order of Mr. Justice Black and so long as it shall remain in effect Southern Railway is incurring, and will continue to incur, costs of at least $3510 per day, without reimbursement therefor, as a direct result of its being prevented from obtaining grain traffic under the multiple-car rates on grain, stayed by said order, which traffic would otherwise be available to and be transported under said rates in said cars by Southern Railway; that for the purpose of ensuring efficient movement of said "Big John" hopper cars of grain to the Southeast under said rates Southern Railway Company also pur-[fol. 166] chased additional diesel locomotive units to increase its motive power capacity for the purpose of handling this traffic; that these costs per day are also being incurred and suffered by Southern Railway, without reimbursement therefor, as a direct result of its being prevented from obtaining grain traffic under the multiple-car rates on grain by the aforesaid order by Mr. Justice Black; that these combined costs being incurred by Southern Railway, without reimbursement, as a result of said order amount to not less than $3510 per day.

Robert S. Hamilton

Subscribed and sworn to before me this 24th day of August, 1962. P. K. Howard, Notary Public. My Commission expires May 1, 1965.

[fol. 167] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 19928

[Title omitted]

ANSWER OF APPELLANTS TO PETITION OF SOUTHERN RAILWAY COMPANY FOR REQUIREMENT OF BOND BY APPELLANTS—Filed August 30, 1962

An analysis of the petition filed by Appellee Southern Railway Company, when stripped to its basic essentials, reveals a request that Appellants be required by this Court to furnish a new bond in the amount of $220,600.00. Appellants respectfully state that the granting by this Honorable Court of the full relief encompassed in the petition of [fol. 168] the Southern Railway Company for the requirement of bond by the Appellants, in effect, would violate both the letter and the spirit of the opinion and of the restraining order entered by Mr. Justice Black on August 17, 1962.

It is pertinent to note that of the four Appellees, it is only Southern Railway Company who now requests a new bond in the astronomical amount of $220,600.00. The Southern Railway Company well knows that the Appellants are not able to make a bond of this size. It further knows that if the Appellants are maneuvered into the position of being unable to post such a bond this would, in effect, nullify any relief which might ultimately accrue to Appellants from a favorable decision by the Supreme Court of the United States on the matter to be presented to it. Further, the Southern Railway Company is fully cognizant of the fact that if the Appellants are unable to have the stay which has been granted by the Supreme Court continued, the Supreme Court's jurisdiction to decide the ultimate question to be presented would be ineffective. The entire controversy would then be moot, and any subsequent decree in Appellants' favor would be nugatory.

[fol. 169] This is not a matter which is presented for the first time. The question of the amount of the bond and the duration of the stay have been exhaustively researched, and briefs covering these points were submitted to Mr. Justice Black. Affidavits and counter-affidavits, advancing the respective contentions of the parties, have been heretofore presented to the reviewing courts and constitute a part of the record on this appeal. Because of this and of Appellants' interpretation of Mr. Justice Black's opinion and decree, Appellants have not further burdened the record by filing additional counter-affidavits at this time.

The initiation of this petition by the Southern Railway Company is a patent effort to have this Court disregard the opinion rendered by Mr. Justice Black on August 17. In this regard, Mr. Justice Black's opinion, in pertinent part, reads as follows:

> "The railroads insist that plaintiffs should be required to give a bond of more than a half million dollars to compensate the railroads for loss of profits from anticipated grain traffic. Plaintiffs object on many grounds, one of which is that to require such a bond, [fol. 170] which they claim they cannot make, would itself amount to a denial of relief. Both the District Court and the Court of Appeals refused to require plaintiffs to make a bond to compensate for anticipated losses in traffic. *The Court of Appeals provided only that plaintiffs file a bond in the sum of $10,000.00, conditioned for the payment of such costs, expenses, and damages as might be incurred or suffered by any of the defendants in giving notice and information of its order but not including loss of revenue resulting from the issuance of its order. I agree that this bond is sufficient.* If for any reason the present bond is deemed to have expired or if it would not protect against the costs resulting from this extension, the parties are free to ask the Court of Appeals to require and approve a new bond in lieu of the old one, to be filed with the clerk of that court, containing the same conditions, stipulations, and limitations." (Emphasis supplied)

Appellee Southern Railway Company cites Mr. Justice Black's order to support its position. This order, in pertinent part, provides:

> "The bond heretofore filed in the Court of Appeals pursuant to its order of August 3, 1962 shall be deemed to be sufficient but if, for any reason, said bond is deemed to have expired or if it would not protect against the costs resulting from this order, the parties are free to request said Court of Appeals to require and approve a new bond in lieu of said bond. *The* [fol. 171] *conditions, stipulations and limitations of the original bond shall be incorporated in any such new bond* and when approved, it shall be filed with the Clerk of the Court of Appeals." (Emphasis supplied)

A careful perusal of this order reveals that it is in complete harmony with the opinion, neither of which support Southern Railway Company's position.

In view of the foregoing pronouncements in the opinion and order of Mr. Justice Black, Appellants respectfully submit that he had the advantage of the contentions now advanced by Southern Railway Company when Mr. Justice Black said, with reference to the existing bond which was limited to the amount of $10,000.00—"I agree that this bond is sufficient." He further stated, in substance, that any new bond filed in lieu of the old one should contain "the same conditions, stipulations, and limitations." It is inconceivable, under these circumstances, to reach a conclusion that Mr. Justice Black was doing anything other than decreeing that any new bond which may be required should not exceed the amount of $10,000.00.

The Appellants have no objection to making a new bond [fol. 172] if the Court of Appeals feels, for any reason, that the existing bond has expired or would not protect against the costs resulting from the extension granted by Mr. Justice Black. However, in the current posture of this matter, the Appellants respectfully submit that any new bond required by this Court should contain the "same conditions, stipulations, and limitations" of the old bond. Appellants urge that this new bond should be limited to the

amount of $10,000.00. To require a bond in the amount of $220,600.00, as requested by Southern Railway Company, would be a denial of both the letter and the spirit of Mr. Justice Black's opinion and order, and would mean that any ultimate decision in Appellants' favor would be a fruitless victory only.

Respectfully submitted,

Arrow Transportation Company, O. J. Walls d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., City of Guntersville, Alabama: Sirote, Permutt, Friend & Friedman, First Federal Building, Birmingham 3, Alabama, By Morris [fol. 173] K. Sirote; Lovett and Lovett, Lovett Building, Benton, Kentucky, By John C. Lovett; Joe Starnes, Jr., City Attorney, Guntersville, Alabama.

Of Counsel: Macleay, Lynch, Channing & Bernhard, Commonwealth Building, 1625 K Street, N.W., Washington 6, D.C., Attorneys.

Certificate of Service (omitted in printing).

[fol. 174]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19928

[Title omitted]

Appeal from the United States District Court for the Northern District of Alabama.

ORDER TO TRANSMIT CERTAIN ORIGINAL DOCUMENTS TO SUPREME COURT

It Is Ordered that the original Motion for an Injunction to Preserve the Status Quo Pending Appeal, Temporary Restraining Order, Bond for Temporary Restraining Order, and Order Denying Motion for Injunction in the above entitled and numbered cause, be transmitted to the Clerk

of the Supreme Court of the United States for use in connection with the petition for writ of certiorari, said original documents to be returned upon final disposition of the case by the Supreme Court.

Edward W. Wadsworth, Clerk, United States Court of Appeals, For the Fifth Circuit, by Clara R. James, Chief Deputy Clerk, For the Court.

[fol. 175] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 176] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19928

ARROW TRANSPORTATION COMPANY, et al., Appellants,

versus

SOUTHERN RAILWAY COMPANY, et al., Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

OPINION—September 7, 1962

Before RIVES, JONES and GEWIN, Circuit Judges.

RIVES, Circuit Judge: The question for decision is whether a federal district court has jurisdiction to extend by injunction the statutory seven-month period of rate suspension in a proceeding still pending before the Interstate Commerce Commission.

The plaintiffs, appellants, Arrow Transportation Company, et al., seek to enjoin the four defendants, appellee Railroad Companies, from applying to the rail transporta-
[fol. 177] tion of grain certain railroad tariff schedules

published by them and which are currently under investigation by the Interstate Commerce Commission in Docket No. I. & S. 7656, Grain in Multiple Car Shipments—River Crossings to the South. This appeal is from an order of the district court denying the plaintiffs' motion for a preliminary injunction solely on the ground that it had no jurisdiction of the subject matter.

The complaint based federal jurisdiction on diversity of citizenship, 28 U.S.C.A. 1332; on the existence of a federal question, 28 U.S.C.A. 1331; and on the Clayton Antitrust Act, 15 U.S.C.A. 12, et seq., and 28 U.S.C.A. 1337. The district court found the general jurisdictional averments as to diversity of citizenship and amount in controversy to be true. It further found that during 1961 the defendants published tariff schedules proposing to reduce substantially their rates and charges on the transportation of grain in multiple car shipments from certain Ohio and Mississippi River ports to numerous destinations in the Southeast. Its further findings of fact, conclusions of law and order are expressed so clearly and succinctly that they had best be quoted:

> "6. On protest of interested parties, the Interstate Commerce Commission entered an order on August 7, 1961, finding that "There is reason to believe that they [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contra- [fol. 178] vention of the National Transportation Policy —," and suspending the effectiveness of the proposed tariffs for the maximum statutory period of 7 months pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The Commission set the investigation hearings to begin in October 1961.
>
> "7. It is admitted by the defendants that the Interstate Commerce Commission hearings scheduled for October 1961 were postponed to January 6, 1962 at Southern Railway Company's request because of its change of counsel and that the railroads agreed to ex-

tend the suspension period to July 7, 1962. It is also admitted by the defendants that counsel for the Southern Railway Company became ill during the hearings, that by reason thereof the hearings were interrupted, and that the railroads agreed to extend the suspension period to August 7, 1962. Such delay caused by the Southern Railway Company was compensated by further extension granted by the Southern.

"8. The tariff schedules published by the defendants which are currently under investigation by the Commission in I. & S. Docket 7656 will go into effect at 12:01 A.M. on August 7, 1962 unless the suspension period is extended by the defendants or unless the defendants are enjoined from putting them into effect by a court of competent jurisdiction.

"9. The hearings before the Commission in I. & S. Docket 7656 began on January 6, 1962 and are still [fol. 179] in progress. It is agreed by the parties that the Commission will not be able to enter a final order before August 7, 1962.

"10. The plaintiffs are contending before the Commission that the proposed tariff schedules are unjust, unreasonable, discriminatory and destructive and will violate the Interstate Commerce Act and the National Transportation Policy.

"11. Defendants have declined to comply with plaintiffs' requests that they agree to extend the suspension period for another sixty days.

"12. There is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed rates go into effect at 12:01 A.M. on August 7, 1962, for which plaintiffs will have no adequate remedy at law.

"Conclusions of Law

"1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and

limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates.

"2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate [fol. 180] Commerce Commission before the entry of a final order by the Commission approving the rates. The only jurisdiction of a Court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court, upon complaint filed against the United States as a necessary defendant, to review the order of the Commission.

"WHEREFORE, it is hereby ORDERED:

"1. That the motion for a preliminary injunction and a temporary restraining order be and the same is hereby denied.

"2. That the motion of defendant Southern Railway Company that the complaint be dismissed and the same is hereby denied."

Section 6 of the Interstate Commerce Act (49 U.S.C.A. §6) provides that rates and charges for transportation shall be initiated and published by the carrier and shall not be changed except after thirty days notice to the Commission unless the Commission, in its discretion and for good cause shown, allows changes upon less notice. The section most pertinent to the present appeal is Section 15, paragraph (7):

"*Commission to determine lawfulness of new rates; suspension; refunds.* Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new [fol. 181] individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon

its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the [fol. 182] interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice

is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." 49 U.S.C.A. §15, par. (7).

The Act seems to us to be a model of clarity. It is of course elementary that the power to prescribe rates to be charged in the future is a legislative function. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 1922, 259 U. S. 285, 291; *Terminal R. Asso.* v. *United States*, 1924, 266 U. S. 17, 30; *Interstate Commerce Commission* v. *Railway Co.*, 1897, 167 U. S. 479, 499; 13 C.J.S. Carriers, §275(b), pp. 623, 624. Though not so frequently declared in the decisions, it would seem equally clear that the power to suspend or not to suspend rates involves a determination of what the rates shall be during the suspension period, which frequently extends over months and years, and is itself a legis- [fol 183] lative function. See *Board* v. *Great Northern Ru.*, 1933, 289 U. S. 412, 429, 430; 1 Davis, Administrative Law Treatise, §7.08, p. 442; 9 Am. Jur. Carriers, §65, p. 472.

The Congress, in its wisdom, has permitted carriers to initiate their own schedule of rates subject to the authority of the Interstate Commerce Commission to determine the lawfulness of such rates. Pending the Commission's hearing for such purpose, it may suspend the operation of the rate schedule "but not for a longer period than seven months beyond the time when it would otherwise go into effect." 49 U.S.C.A. §15(7). Some irreparable injury appears unavoidable in the process of establishing new rates. If the new rates are ultimately determined to be just, reasonable, and lawful, the carriers and that portion of the public which would benefit from the change in rates have nonetheless suffered irreparable injury during the period of suspension. If the period of suspension has expired and the new rate schedule goes into effect, but is subsequently determined to be unlawful, then competing carriers and that portion of the public which would suffer because of the change in rates has been injured during the period when the rates were not suspended, and in many cases that injury is irreparable.

In case of increased rates, the Commission may require refunds. Experience has proved that such power to require refunds is itself an inadequate and unsatisfactory remedy, but even that remedy is unavailable in the case of reduced rates.

Prior to the Act carriers were at liberty to establish and maintain even unreasonably low rates provided they were [fol. 184] not discriminatory. *Keogh* v. *C. & N.W. Ry. Co.*, 1922, 260 U. S. 156, 161. If cheap rates are monopolistic or in restraint of trade, and are the result of a combination or conspiracy among carriers,[1] the Government has adequate civil and criminal remedies under the Antitrust Act. *Keogh* v. *C. & N.W. Ry. Co., supra.* Section 16 of the Clayton Act, however, clearly stands in the way of private injunctive relief.

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject [fol. 185] to the provisions of chapters 1 and 8 of

[1] Southern Railway Company has filed an affidavit to the effect that, "There was absolutely no concert of action between Southern and any other railroad in connection with the determination and publication of these rates which subsequently were suspended by the Interstate Commerce Commission and are now being investigated in ICC Docket I. & S. 7656."

Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." Title 15, U.S.C.A. §26.

The Supreme Court has declared:

"'Under that section jurisdiction of the Commission does not delimit the jurisdiction of the federal courts to restrain violations of the Sherman Anti-Trust Act. Compare *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505. It affects only the capacity of a private party to maintain a suit to restrain violations. See *General Investment Co.* v. *New York Central R. Co.*, 271 U. S. 228. Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the Government itself. . . ."

Central Transfer Co. v. *Terminal R.R. Ass'n*, 1933, 288 U. S. 469, 474, 475.

Section 8 of the Interstate Commerce Act appears to provide that the carriers would be liable in damages to the persons injured if the cheaper rates are ultimately declared unlawful:

[fol. 186] "In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fees, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." Title 49, U.S.C.A. §8.

All of the provisions of the Interstate Commerce Act are required to be administered and enforced with a view to carrying out the National Transportation Policy declared in the Act of September 18, 1940, c. 722, Title I, §1, 54 Stat. 499:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, [fol. 187] or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

An unreasonably low rate found to be in violation of the National Transportation Policy would give rise to an action for damages under 49 U.S.C.A. §8. That such a finding may ultimately be reached after full hearing furnishes no authority to the Courts to extend the statutory seven-month period of rate suspension in the face of the clear mandate of the statute that, "if the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period . . ." [49 U.S.C.A. §15(7).]

Essentially the Court is asked to declare as to the present case that the seven-month period of suspension provided in the statute is inadequate. If that can be done in this case, there is practically no end to the number of instances in which the courts will be called on to set aside the mandate of the statute. Congress, in its wisdom, has fixed seven months as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are [fol. 188] in effect amending the statute and that is a matter beyond their power.

We have given careful consideration to the excellent briefs of counsel on both sides and to those filed by amici curiae. A further discussion of many pertinent authorities would be in order if time were not of the essence. Since, however, this is a case where justice delayed would be justice denied, and we have no doubt of the soundness of our decision, we shall forego any further discussion. Since Southern Railway Company has not appealed, we do not pass on that part of the judgment denying its motion to dismiss. See 7 Moore's Federal Practice, 2nd ed., Sec. 72.05.

To afford the appellants a reasonable time to seek a writ of certiorari from the Supreme Court, it is directed that the mandate of affirmance issue twenty-one days from the date of this decision. See Fifth Circuit Rule 32. If during that period a petition for certiorari has been filed, prompt consideration will be given to any request for a further stay of the mandate. See 28 U.S.C.A. §2101(f); Supreme Court Rule 18.

The judgment of the district court denying the motion for a preliminary injunction is affirmed.

Affirmed.

[fol. 189]

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1961
No. 19,928

ARROW TRANSPORTATION COMPANY, et al., Appellants,

versus

SOUTHERN RAILWAY COMPANY, et al., Appellees.

Appeal from the United States District Court
for the Northern District of Alabama.

Before:

RIVES, JONES and GEWIN,
Circuit Judges.

JUDGMENT—September 7, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause denying the motion for a preliminary injunction be, and it is hereby, affirmed;

It is further ordered and adjudged that the appellants, Arrow Transportation Company, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 7, 1962

Issued:

[fol. 190] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 19928

[Title omitted]

SUPPLEMENTAL ANSWER OF APPELLANTS TO PETITION OF SOUTHERN RAILWAY COMPANY FOR REQUIREMENT OF BOND BY APPELLANTS—Filed September 13, 1962

Since filing their original answer to the Southern's petition for requirement of an additional bond, Appellants have received Judge Richard T. Rives' letter of August 29 stating that the Court would pass upon the merits of the appeal as expeditiously as possible and would defer consideration [fol. 191] of the petition for a new bond until the Court has considered the merits. Judge Rives indicated that any further bond might be in a prohibitive amount. In view of the potential hearing on Southern's petition, Appellants now submit this supplement to their answer to Southern's petition for a new and larger bond.

Southern asks that the $10,000 bond be increased to $220,600 to cover one additional item of anticipated cost, i.e., the cost of owning 500 jumbo hopper cars at $7.02 per car per day for 60 days. No claim is being made at the present time for a bond to cover attorney fees, travel expenses, etc.[1] Southern's claim at first blush appears plausible. It therefore merits careful scrutiny.

It should be pointed out, at the outset, that neither Judge Gewin nor Mr. Justice Black restrained Southern from using the jumbo hopper cars. They restrained, instead, the charging of certain drastically reduced rail rates on grain. Southern now seeks to establish, by Mr. Hamilton's affi-

[1] Attorneys fees and legal expenses other than court costs are not recoverable on an injunction bond. *Oelrichs* v. *Spain*, 15 Wall (US) 211, 21 L.ed. 43; *Tullock* v. *Mulvane*, 184 U.S. 497, 46 L.ed. 657; *Missouri K'& T. R. Co.* v. *Elliott*, 184 U.S. 530, 46 L.ed. 673; see: *Annotation* 164 ALR 1111.

davit, that by restraining certain *rates* the Courts have in fact restrained the use of certain *equipment*. This, of course, does not follow.

[fol. 192] In the first place, it is abundantly clear that the "Big John" aluminum hopper cars can be and are being used to haul many commodities other than grain. Of course, the use of such equipment moving other commodities has not been restrained. As shown by the attached excerpts from the testimony before the Commission, D. W. Brosman, then Executive Vice-President, now President of Southern, testified that the equipment can be used to haul light clay, shale, feed and other similar commodities. W. M. King, Southern's Vice-President in charge of traffic, testified that the jumbo cars were not intended to be assigned "to grain traffic exclusively" but were being used to move "many commodities that will use this type of equipment".[2] Appellants should not be required to make a bond which contemplates that these 500 cars will be idle 100% of the time, when it is clear that this equipment is in fact in extensive daily use.

In the second place, Hamilton's affidavit is grossly misleading in its factual statements and is therefore unreliable. For example, Mr. Hamilton states that Southern "is now being prevented from anything more than token use of these railroad cars in transporting such grain under the involved rates." [Hamilton Aff. p. 2, underscoring supplied]. With the underscored qualification, the statement may be true. It is, however, decidedly misleading. Actually, the cars [fol. 193] which have been delivered to Southern have been used heavily in grain traffic since their acquisition, although not "under the involved rates." They have been used in moving grain traffic under the *present* rates which are nearly 3 times as high as the involved rates.

Mr. Berger's attached affidavit shows that one shipper at Chattanooga, Tennessee, Cargill, Incorporated, shipped 183 jumbo cars of grain on the Southern between August 10 and August 31, 1962, and Mr. Sprunger's attached affidavit shows that another, Central Soya Company, Inc., shipped 199 jumbo cars of grain from Chattanooga via the

[2] Bromley's attached affidavit, p. 4, 5.

Southern between March 15, and September 1, 1962. These shipments were not made "under the involved rates"; they were made under the much higher existing rates and the restraining order has not impeded these movements.

These are only two of the hundreds of grain shippers on the Southern. Appellants, of course, have no way of knowing how many other shippers, like Cargill and Central Soya, have been making extensive use of the "Big John" equipment to haul grain under the existing high level of rates.[3] [fol. 194] Southern should be required to disclose this information. In addition, Southern should be required to establish that there are no other commodities being hauled by Southern, such as light clay, shale, feed, which can be transported in the jumbo cars.

Mr. Hamilton's statement (p. 2) that "such 'Big John' cars have received only sporadic and intermittent use since they were acquired" is simply untrue unless it can be regarded as having been qualified by his subsequent use of the phrase "under these rates". The fact is that the cars have been and are being used so extensively by Southern that it has experienced a shortage in these cars. On May 2, 1962, Southern's Western Traffic Manager informed Neumond, Inc., that "all of our covered hopper cars are in assigned service" and that "we are actually short of this type of equipment for loading on our own railroad" (See Aff., Benj. J. Schulein, attached).

The affidavits of Mr. Berger, Mr. Sprunger and Mr. Schulein establish that if Southern wished to make greater use of the new equipment, it has had many opportunities to do so. It could, if it would, make the equipment available for use on off-line hauls of grain, i.e., grain originating on other railroads destined for points on the Southern. [fol. 195] It has not made the equipment available for this use. Southern cannot voluntarily and deliberately keep the equipment idle and claim that it has been damaged by such

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[3] Southern's witness, Mr. A. C. Henderson, testified on June 19, 1962 that "I do know that grain moved in those [jumbo] cars, what proportion that was of the total, I don't know" [Bromley affidavit p. 6].

idleness.[4] One restrained by an injunction has an affirmative duty to mitigate damages and there can be no recovery for damages caused by Southern's deliberate failure to do that which would serve to mitigate damages.[5]

[fol. 196] In spite of the extensive use of "Big John" cars in highly remunerative grain traffic movements on the existing rate level, Southern asks a bond covering the full costs of ownership as if all 500 cars would be idle 100% of the time. This is a transparent effort to require a prohibitive bond and to nullify the relief granted by Judge Gewin and Mr. Justice Black.

Southern claims, and Mr. Hamilton's affidavit affirms, that the "Big John" cars represent "a major technological breakthrough" which enables Southern to haul grain at less cost than if the obsolete standard box and hopper cars are used. If this is true, Southern has an affirmative duty to use this more modern equipment in its grain movements under the existing rates and thus to mitigate the damages it would suffer if the equipment were left idle. Indeed, it has the duty to use this equipment for hauling *any* commodity that can be handled more economically in the new equipment than in the old.

Southern may claim that if it substitutes the modern equipment for the standard equipment, some of the obsolete

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[4] See Berger's affidavit, p. 2, 3. Since Mr. Berger's affidavit was signed, Appellants have learned that on September 4, 1962, Southern by voluntary short-notice action has joined the Norfolk and Southern Railroad in the use of multiple car rates on North Carolina intrastate movement of grain. This action will permit use of the jumbo cars for hauling grain from origins on the Southern to destinations on the N & S and from origins on the N & S to destinations on the Southern. For example, Cargill can now use the new equipment for shipping grain intrastate from its Washington and Wilson, N. C., plants. This action by the Southern, voluntarily withheld since Oct. 26, 1961, will greatly increase opportunities for use of jumbo cars on the multiple car intrastate rates. This is especially true today because the grain harvest season in North Carolina, when intrastate volumes are heaviest, is now at hand.

[5] *I.T.S. Rubber Co.* v. *Tee Pee Rubber Co.*, CA 6, 295 Fed. 479, *Allen* v. *Jones*, CC Ark. 79 Fed. 698; Annotation: 66 ALR 2d. 1132; 28 Am. Jur. *Injunctions*, Sec. 350, p. 866.

box and hopper cars will become idle. Perhaps so, if we assume that there will be no change in the carloadings of commodities that can be moved in standard cars. If so, the damages will be the depreciation on the obsolete, antiquated equipment made idle by the injunction and not the cost of owning the modern, expensive "Big John" cars. If the volume of other traffic increases, this idleness of stand-
[fol. 197] ard cars will diminish and Southern's losses will be reduced. If that traffic volume decreases, the number of idle cars will be increased, but the increase in idleness will not be attributable to the injunction and the damages therefrom will not be chargeable to the Appellants.

And, if Appellants are to be charged with depreciation on the idled obsolete equipment, Appellants are entitled to offset the increased profits which Southern earns when it substitutes the modern equipment for the obsolete equipment. How else can Southern's net loss be determined? For example, as shown in the record, the present all rail rate from St. Louis to Birmingham, Alabama, is $8.70 per ton. A movement under that rate which the railroads themselves established is certainly compensatory to Southern even if the obsolete equipment is used. If the more modern "Big John" cars are used, the profit margin will be greater (if we can believe Southern's claim that this "technological breakthrough" reduces its costs to such extent that it can reduce the rate from $8.70 per ton to $3.12 per ton and still earn a profit). If the bond must cover losses incurred because obsolete equipment is idle, the *net* loss to Southern would be the depreciation on that equipment *less* the increased profits realized from substituting the modern equipment for the antiquated equipment.

Also, Appellants should be credited with the increased profits which Southern will earn on a constant, unchanged movement of grain during the injunction period. To illus-
[fol. 198] trate, Mr. Berger's affidavit refers to grain received at Mocksville, N. C., nearly 100% of which arrives via Southern from Chattanooga. The distance is 367 miles. The existing rate is $5.60 per ton. Cargill has been shipping about 15 jumbo cars per week from Chattannooga to Mocksville on that rate and the movement is regular and stable.

yielding gross revenues to Southern of about $8,400.00 per week. Since the proposed rates will not apply to this movement, grain to Mocksville probably would move from Cincinnati if the proposed rates were in effect. This would substitute a 574 mile haul for a 367 mile haul and a $3.51 rate for a present $5.60 rate. Southern today grosses over $3100. per week more on this 207 mile shorter haul than it would if the restraining order were dissolved. The losses, if any, which will accrue to Southern because of idled standard equipment should be offset by the increased revenues it earns on such constant movements of grain under existing rates.

Mr. Hamilton states, and Southern's brief repeats, that these 500 "Big John" cars were purchased "solely" for use on these proposed rates. It is hard to square this statement with Mr. Brosnan's testimony before the Commission [fol. 199] that 75 of these cars were acquired nearly 2 years before the involved rates were proposed to the Commission, and Vice-President King's testimony that the equipment can be and is being used in moving other commodities.[6] If Mr. Hamilton's statement is accepted at face value, the fact that Southern originally *intended* the cars to be used on the proposed rates certainly does not prevent their use on existing rates nor their use in hauling other commodities. Hamilton's affidavit conflicts with Mr. King's testimony that the jumbo cars were not "to be assigned to grain traffic exclusively" [Bromley, Aff. p. 5].

Mr. Berger and Mr. Sprunger state that their two companies have shipped 211 standard-size cars of grain from Chattanooga via the Southern between the effective date

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[6] See Bromley Aff., p. 4, 5.

Perhaps Mr. Hamilton refers only to the 500 jumbo cars ordered by Southern after the ICC suspended the proposed rates and he is not including the 75 cars acquired some 2 years before that time. If so, his statement that Southern "has purchased 500 'Big John' heavy loading aluminum hopper cars" is grossly misleading. It implies that these 500 cars have been on hand for some time. However, he testified before the Commission on July 5, 1962 that Southern received delivery of 200 cars after the hearing started and delivery of the remaining 300 cars "is to be completed by October 15." (Bromley's Aff., p. 7).

of the restraining order and August 31. Granted that some [fol. 200] of these cars may have been consigned to shippers who cannot unload "Big John" cars, it is inconceivable that at least a part of this grain could not have moved in the more modern equipment if Southern had so desired. Appellants should not be required to protect Southern against self-manufactured losses or against losses which can be prevented simply by the exercise of ordinary business prudence.

Finally, Appellants submit that upon basic equitable principles they should not be required to make a bond in an amount which will protect Southern from such losses as it may sustain, if any, because some of the new equipment is idled as a result of the restraining order. It is clear that Southern ordered 200 new cars in the fall of 1961 *after* the Commission had made a preliminary finding that the proposed rates would probably be unlawful, *after* the Commission had suspended the rates, and *after* the Commission had placed upon Southern the burden of proving their lawfulness.[7] Months later Southern ordered the remaining 300 cars, only part of which have been delivered, while the Commission was still investigating the probable unlawfulness of the rates in extensive and highly adversary proceedings.[8] Under such circumstances, did not Southern assume the risk that the proposed rates might not go into effect in accordance with Southern's intended schedule? There [fol. 201] seems scant equity in Southern's claim to be reimbursed for 100% of its costs of ownership when the purchases were made in such complete disregard of the question of lawfulness of the rates.

Conclusion

Southern's claim for a higher bond raises numerous and complex factual issues. The rule requiring mitigation of damages requires a showing that the new equipment will, in fact, be forced into idleness because Southern is restrained from charging certain rates on one commodity. It requires a showing that there is and will be *no* grain or

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[7] Bromley Aff., p. 4.

[8] Bromley Aff., p. 7.

other traffic which can be hauled in this new equipment; that, if the rates had not been restrained, optimum, maximum use of the new equipment would have been achieved; and that if such optimum use were achieved Southern's net revenue picture would be brighter than if the new equipment were used to move grain on the existing, more remunerative rates. Southern has not been restrained from using the newer, more modern equipment. It has simply been restrained from charging ridiculously low rates on grain, rates which will earn for Southern only 35% as much revenue per ton mile as the existing rates.

[fol. 202] Appellants respectfully submit that Southern has shown no reasonable basis for requiring a bond in excess of Appellants' capabilities and in excess of that required by Judge Gewin and by Mr. Justice Black.

Respectfully submitted,

Arrow Transportation Company, O. J. Walls, d/b/a O. J. Walls Company, John D. Bagwell Farms & Hatchery, Inc., City of Guntersville, Alabama, Sirote, Permutt, Friend & Friedman, First Federal Building, Birmingham 3, Alabama, By: Morris K. Sirote; Lovett & Lovett, Benton, Kentucky, By: John C. Lovett, Joe Starnes, Jr., City Attorney, Guntersville, Ala.

Of Counsel: Macleay, Lynch, Channing & Bernhard, Commonwealth Building, 1625 K Street, N.W., Washington 6, D. C.

[fol. 203] Certificate of Service (omitted in printing).

[fol. 204] AFFIDAVIT OF JAMES F. BROMLEY AS TO RECORD

James F. Bromley, being first duly sworn, deposes and says:

1. That he is employed by the law firm of Macleay, Lynch, Channing and Bernhard, 1625 K Street, N.W., Washington 6, D. C., and in the course of his employment he has made a review and abstract of the transcript of record in Inter-

state Commerce Commission Docket Number I. & S. 7656, *Grain in Multiple-Car Shipments—River Crossings to the South*, as a copy of each volume of that transcript of record has been received from the official reporter and as it has been subsequently corrected in accordance with Rule 1.90 of the General Rules of Practice before the Interstate Commerce Commission.

[fol. 205] 2. That, consequently, he has become familiar with the said transcript of record and knows of his own knowledge that the following excerpts of testimony from the said transcript of record are true, correct and exact; that these excerpts appear in the transcript of said record at the pages shown; and that they have been taken directly from the transcript after it had been corrected in accordance with Rule 1.90 of the General Rules of Practice before the Interstate Commerce Commission.

[fol. 206] EXCERPT FROM TESTIMONY

of

D. W. Brosnan—I. & S. Docket No. 7656

Transcript Page 106, ll. 17-20; January 8, 1962

Q. How many such cars does Southern own at the present time?

A. I think that at the moment we own 78. We have taken orders on 200 at the present time and we will have the 200 additional car ownership in a matter of about six weeks.

[fol. 207] EXCERPT FROM TESTIMONY

of

D. W. Brosnan—I. & S. Docket No. 7656

Transcript Pages 122 and 123, ll. 18-25, 1-6; January 8, 1962

Q. What other service can the cars, the 78 I believe cars that you mentioned, and the 200 that you have on order, what other service can they be used in?

A. Let me make this clear. We bought 75 of these cars over two years ago and we have bought 200 of them this

past fall. We have had delivery of three of those 200, which accounts for the 78 that we have now. We have 197 of the 200 yet to come. Let me make that clear first.

Q. Now I want to know what kinds of traffic those cars are capable of hauling in addition to grain traffic?

A. Well, they can haul in addition to grain they can haul the lighter clays, the very light shale and clays that are used in making slick paper. They can haul feeds which are very light, materials of that character.

[fol. 208] EXCERPT FROM TESTIMONY

of

W. M. King—I. & S. Dócket No. 7656

Transcript Page 437, ll. 7-13; January 11, 1962

Q. With regard to the equipment, Mr. King, and I refer to it as jumbo equipment, is it to be assigned to grain traffic exclusively?

A. No. We are moving on our railroad many commodities that will use this type of equipment.

Q. On a single carload basis?

A. Generally.

[fol. 209] EXCERPT FROM TESTIMONY

of

A. C. Henderson, I. & S. Docket No. 7656

Transcript Page 11,054, ll. 4-14; June 19, 1962

Q. Have you any general information as to 1961 or 1962 as to what portion of your grain movements have been under single-car rates in the Big John cars?

A. No, sir.

Q. Has the traffic department provided any information at all on that, as regards the traffic consist and the type of equipment in it which moved?

A. I do not have any figures which would indicate what portion of the total movement was in the so-called Big John cars.

I do know that grain moved in those cars. What proportion that was of the total, I don't know.

[fol. 210] EXCERPT FROM TESTIMONY

of

R. S. Hamilton—I. & S. Docket No. 7656

Transcript Page 12,089, ll. 18-24; July 5, 1962.

Q. Has there been any change in the status of those jumbo hopper cars owned by the Southern Railway?

A. Yes. I believe when this hearing started we owned only 75 of them. Since that time we have received delivery on 200 additional and we have 300 more on order. I believe delivery started about the middle of last month and is to be completed by October 15.

[fol. 211] James F. Bromley

District of Columbia) ss.

Subscribed and sworn to before me this 10th day of September, 1962. Yolanda J. De Marco, Notary Public—My Commission expires: Jan. 31, 1963.

[fol. 212] AFFIDAVIT

(Letterhead of Neumond, Inc., 5100 Oakland Avenue, St. Louis 10, Mo.)

State of Missouri)
City of St. Louis) ss.

Benjamin M. Schulein, being first duly sworn, deposes and says:

He is President of Neumond, Inc., with offices at 120 Merchants Exchange Building, St. Louis, Missouri.

Neumond, Inc., is engaged in the merchandising of grain and related products including alfalfa meal, large quantities of which it ships to points located on the lines of the Southern Railway System in the Southeastern States.

Alfalfa meal is well adapted to handling in covered Hopper railroad cars.

One of the principal points of shipment for alfalfa meal by Neumond, Inc., is Blytheville, Arkansas located on the St. Louis-San Francisco Railway.

Neumond, Inc., has made efforts to secure an increase in the availability of covered Hopper cars for loading at Blytheville, Ark., for shipment to points in the Southeast, such cars not having been available at times in the number required for the most satisfactory handling of the business of Neumond, Inc.

In an effort to secure an additional supply of covered Hopper cars the request was made to the Southern Railway System to make available for this use some of its so-called Jumbo covered Hopper cars. That effort was not successful, officials of the Southern Railway System advising affiant that all of its covered Hopper cars are in assigned service, and that they are in short supply for loading on the lines of the Southern Railway System by Industries located thereon.

The attached copy of letter dated May 2, 1962 to affiant from Mr. C. J. Youngblood, Western Traffic Manager of the Southern Railway System is a true and correct copy of the original letter received by affiant.

Benj. M. Schulein, President
Neumond, Inc.

Subscribed and Sworn to before me this 31st day of August, 1962. Jennie B. Billins, Notary Public. My commission expires June 9, 1964.

[fol. 213] ATTACHMENT TO AFFIDAVIT

(Letterhead of Southern Railway System, Traffic Dept., Chemical Bldg., St. Louis 1, Mo.)

May 2, 1962.
61-D.

Mr. B. M. Schulein,
President, Neumond, Inc.,
120 Merchants Exchange, St. Louis 10, Mo.

Dear Mr. Schulein:

You will recall that we have been handling with our Washington Office for some time to develop if it would be

possible to assist the Frisco Railroad in furnishing covered hopper cars to load alfalfa meal at Blytheville, Ark.

We have now been definitely advised by Mr. C. W. Gowl, Assistant Vice-President, Southern Railway, Washington, D. C., that all of our covered hopper cars are in assigned service and it will not be possible for us to assist the Frisco. As a matter of fact, we are actually short of this type of equipment for loading on our own railroad.

Yours very truly,

/s/ C. J. Youngblood
Western Traffic Manager

cc: Mr. Carl Buchheit, Traffic Dept.,
Ralston Purina Company,
835 S. 8th St., St. Louis 2, Mo.

cc: Richland Products Company,
Blytheville,
Ark.

[fol. 214] Affidavit of William M. Berger

William M. Berger, being first duly sworn, deposes and says:

He is Branch Manager in charge of the operations of Cargill, Incorporated at Chattanooga, Tennessee, and also in charge of the operations of that company at Guntersville, Alabama.

Cargill, Incorporated is engaged, among other things, in the merchandising of grain in the Southern portion of the United States, where it distributes very substantial quantities of various types of grain. In fact, Cargill is one of the largest, if not the largest, firms actively engaged in shipping grain from the Tennessee River ports of Chattanooga and Guntersville into the Southeast.

In his capacity as Branch Manager, he is in charge of and familiar with the transportation employed in the distribu-
[fol. 215] tion of grain from Chattanooga and Guntersville to the customers of Cargill, Incorporated in the Southeast. He is also familiar with the operations of other Cargill elevators, particularly those located at other points in the Southeast.

Since they became available, Cargill has made extensive use of the so-called Jumbo Hopper cars of Southern Railway System for distribution through its Chattanooga facility. From mid-March until the latter part of June of 1962 such cars were in tight supply, and were not made available by Southern to the full extent of their possible use by Cargill. During this period approximately 52 percent of the outbound grain shipments from Chattanooga was via the Southern Railway. Since the latter part of June they have been more readily available and have been used extensively in the outbound haul from Chattanooga via Southern Railway.

During the week ended August 17, 1962, the first full reporting week by Cargill after the initial temporary restraining order became effective, Cargill loaded 52 jumbo hopper cars and 8 standard box and hopper cars of grain for shipment via Southern to points in the Southeast.

During the week ended August 24, Cargill loaded 72 jumbo cars and 6 standard boxcars and hopper cars and during the week ended August 31, it loaded 59 jumbo hopper [fol. 216] cars and 2 standard boxcars for outbound shipment via Southern. These shipments went to various points on the Southern Railway in Georgia and North and South Carolina. He estimates that during the week ended September 6, it will load at least 45 jumbo cars and 6 standard size boxcars and hopper cars. He estimates that the average "turn-a-round" time for jumbo cars handling such shipments is from 9 to 14 days.

Cargill recently has experienced serious shortage of railroad cars for loading at Guntersville, which is served by Appalee Louisville and Nashville Railroad, but not by Southern Railway; Cargill could and would make use of Jumbo Hopper cars for shipments from that point if the Southern had them available and would permit them to be used by the Louisville and Nashville Railroad in such transportation.

As an example of the revenue to Southern Railway System from the employment of these cars for shipments from Chattanooga, Cargill recently has been using Jumbo Hopper cars for fifteen or sixteen carloads per week to Mocksville, North Carolina, a distance of 367 miles via the

route of Southern Railway System, at a rate of $5.60 per ton. The proposed rates will not apply from Chattanooga to Mocksville, however. If the proposal were extended to this movement, the rate would be $2.52 per ton and Southern would have to haul over twice as much grain and furnish [fol. 217] twice the rail service in order to earn the same gross revenue it now receives and it now receives virtually 100 percent of this traffic. The existing rate to Mocksville is to be contracted with the proposed rate from Cincinnati, Ohio, of $3.51 per ton for a distance of 574 miles via the route of the Southern Railway System. If the grain moved from Cincinnati to Mocksville on the rates which have been enjoined Southern would be required to haul 60 percent more grain for a 56 percent greater distance in the same equipment in order to earn the same gross revenue that it now earns on the existing rail movement from Chattanooga.

The harvest season for local grain in the Southeast is imminent, and such local grain will be available to Southeastern consumers in substantial quantities until mid-November. Cargill has facilities in eastern North Carolina, where considerable quantities of local grain are produced. These are located at Washington and at Wilson. Cargill would be happy to employ jumbo cars for movement of grain from those facilities to consuming points on Southern Railway System in western North Carolina. However, those facilities of Cargill are located on the Norfolk and Southern Railroad, and thus far Southern Railway System has not made such cars available for the movement from origin on the Norfolk and Southern Railroad to destination on the Southern Railway.

/s/ William M. Berger
William M. Berger

[fol. 218]
State of Tennessee)
County of Hamilton) ss.

Subscribed and sworn to before me, a Notary Public for the State and County aforesaid, this eighth (8th) day of September, 1962. Louise Kill, Notary Public. My Commission expires April 4, 1966.

[fol. 219] AFFIDAVIT OF R. L. SPRUNGER

R. L. Sprunger being duly sworn, deposes and says:

He is General Rail Traffic Manager of Central Soya Company, Inc. located at 300 Fort Wayne Bank Building, Fort Wayne, Indiana. He is responsible for all rail traffic matters and is familiar with the shipment of grain via rail from the company's operations at Chattanooga, Tennessee.

During the period, March 15, 1962 through August 6, 1962, Central Soya Company, Inc. made 181 shipments in "Big John" covered aluminum hopper cars and 1,465 shipments in other hopper cars furnished by and shipped on the Southern Railway System. During the period, August 7, 1962 through September 1, 1962, 18 shipments were made in "Big John" covered aluminum hopper cars and 195 shipments in other hopper cars. These shipments were in cars furnished by the Southern Railway and shipped on the Southern Railway System.

Dated this 5th day of September, 1962.

R. L. Sprunger
General Rail Traffic Manager

State of Indiana)
Allen County) ss.

Subscribed and sworn to before me this 5th day of September, 1962. Elsie Schmidt, Notary Public. My commission expires May 28, 1964.

[fol. 220] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 221]

SUPREME COURT OF THE UNITED STATES

No. 430—October Term, 1962

ARROW TRANSPORTATION COMPANY ET AL., Petitioners,

vs.

SOUTHERN RAILWAY COMPANY ET AL.

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.